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## Firearms and the Black Community: An Assessment of the Modern Orthodoxy Commentary: Gun Control Policy and the Second Amendment

Nicholas J. Johnson

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## Article

### Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy

NICHOLAS J. JOHNSON

*The heroes of the modern civil rights movement were more than just stoic victims of racist violence. Their history was one of defiance and fighting long before news cameras showed them attacked by dogs and fire hoses. When Fannie Lou Hamer revealed she kept a shotgun in every corner of her bedroom, she was channeling a century old practice. And when delta share cropper Hartman Turnbow, after a shootout with the Klan, said “I don’t figure I was being non-nonviolent, (yes non-nonviolent) I was just protecting my family”, he was invoking an evolved tradition that embraced self-defense and disdained political violence. The precise boundaries and policy implications of that tradition had always been debated as times and context changed. But the basic idea that the community would support indeed exalt the man or woman who fought back in self-defense, even with, nay, especially with arms, has a far longer pedigree than the modern orthodoxy which urges stringent supply controls as the clearly best firearms policy for black folk. Full consideration of this black tradition of arms raises serious questions about the practical wisdom and conceptual grounding of that modern orthodoxy.*

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# Firearms Policy and the Black Community: An Assessment of the Modern Orthodoxy

NICHOLAS J. JOHNSON\*

## I. INTRODUCTION

*“[A] Winchester rifle should have a place of honor in every Black home.”*

—Ida B. Wells Barnett, 1892<sup>1</sup>

*“To get them you have to go through a bureaucracy that makes it difficult . . . . Nobody thinks we would have fewer shootings and fewer homicides if we had more relaxed gun laws.”*

—Eleanor Holmes Norton, 2010<sup>2</sup>

Guns are a scourge on the black community. That is the conventional wisdom. Black-on-Black gun crime imposes terrible costs.<sup>3</sup> So it is no surprise that many in the Black community and most of the Black leadership endorse stringent gun control measures. This translates into broad support for the most aggressive supply restrictions and gun bans like those recently overturned in Washington D.C. and Chicago.<sup>4</sup>

Black mayors of big cities and Black legislators have overwhelmingly

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<sup>1</sup> IDA B. WELLS, *Southern Horrors: Lynch Law in All Its Phases*, in SOUTHERN HORRORS AND OTHER WRITINGS 49, 70 (Jacqueline Jones Royster ed., 1997).

<sup>2</sup> Gary Fields, *New Washington Gun Rules Shift Constitutional Debate*, WALL ST. J., May 17, 2010, at A1.

<sup>3</sup> See, e.g., Brief for NAACP Legal Defense & Educational Fund, Inc. as Amici Curiae Supporting Petitioners, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) at 1–2 [hereinafter NAACP Amicus Curiae], available at <http://www.gurapossessky.com/news/parker/documents/07-29tsacNAACPLegal.pdf> (stating and explaining that “[t]he effects of gun violence on African-American citizens are particularly acute” and providing the example that how “all but two of the 137 firearm homicide victims in the District were African Americans”).

<sup>4</sup> See *McDonald v. Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment right to keep and bear arms for the purpose self-defense is applicable to state and local governments); *District of Columbia v. Heller*, 554 U.S. 570, 573–75, 635 (2008) (holding that a District of Columbia ban on handgun possession, as well as an effective ban on the use of firearms for defense in the home, violated the Second Amendment right to armed self-defense).

avored gun bans and restrictions that go substantially beyond prohibiting guns to criminals and the untrustworthy.<sup>5</sup> The National Urban League is a sustaining member of the Coalition to Stop Gun Violence, previously the National Coalition to Ban Handguns.<sup>6</sup> The NAACP pressed a stringent gun control agenda in *NAACP v. AccuSport*,<sup>7</sup> arguing that gun makers negligently supplied and marketed firearms that ravage poor Black communities. In Chicago, Jessie Jackson advanced the point with protests of legal gun sales in the suburbs of Chicago.<sup>8</sup>

In an amicus brief in *District of Columbia v. Heller*,<sup>9</sup> the National Association for the Advancement of Colored People (“NAACP”) urged the

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<sup>5</sup> In 1992, New York Congressman Major Owens introduced a joint resolution, “[p]roposing an amendment to the Constitution of the United States repealing the Second Amendment to the Constitution.” H.R.J. Res. 438, 102d Cong. (1992), available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d102:438:/list/bss/d102HJ.lst:..>. In 1993, Owens proposed a separate Bill, explaining:

Mr. Speaker, my bill prohibits the importation, exportation, manufacture, sale, purchase, transfer, receipt, possession, or transportation of handguns and handgun ammunition. It establishes a 6-month grace period for the turning in of handguns. It provides many exceptions for gun clubs, hunting clubs, gun collectors, and other people of that kind.

H.R. Res. 302, 103d Cong. (1993), 139 Cong. Rec. 28527, 28533 (Nov. 10, 1993) (statement of Rep. Major Owens). In 1999, Illinois Congressman Bobby Rush revealed:

My staff and I right now are working on a comprehensive gun-control bill. We don’t have all the details, but for instance, regulating the sale and purchase of bullets. Ultimately, I would like to see the manufacture and possession of handguns banned except for military and police use. But that’s the endgame.

Evan Osnos, *Bobby Rush; Democrat, U.S. House of Representatives*, CHI. TRIB., Dec. 5, 1999, at C3 (quoting Rep. Bobby Rush). Mayor of Detroit, Dennis Archer, brought suit against a number of firearm manufacturers for negligent oversupply of guns in a manner injurious to the City of Detroit. *Archer v. Arms Tech.*, No. 99-912658 NZ, 2000 WL 35624356 (Mich. Cir. Ct. May 16, 2000). This claim was deemed barred by subsequent state legislation in *Mayor of Detroit v. Arms Tech., Inc.*, 669 N.W.2d 845, 854–55 (Mich. Ct. App. 2003). See *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 424–25 (Ind. App. 2007) (explaining that in a case known as “Smith & Wesson II,” the city of Gary, Indiana alleged that the gun manufacturer Smith & Wesson knew that guns it sold to intermediaries would ultimately be sold illegally). One of Gary’s early Black mayors, Richard Hatcher, was a strong advocate of stringent gun controls. Hatcher stated in 1979 that he would not be approving any citizens’ concealed carry applications. He said if they wanted to challenge his authority, they were welcome to take him to court. Some of them did. *Kellogg v. City of Gary*, 562 N.E.2d 685, 688 (Ind. 1990).

<sup>6</sup> HARRY L. WILSON, GUNS, GUN CONTROL, AND ELECTIONS: THE POLITICS AND POLICY OF FIREARMS 145 (2007) (describing how the Coalition to Stop Gun Violence “was founded in 1974 as the National Coalition to Ban Handguns”); *Member Organizations*, COAL. TO STOP GUN VIOLENCE, <http://www.csgv.org/about-us/member-organizations> (last visited Mar. 5, 2013).

<sup>7</sup> 271 F. Supp. 2d 435, 446–47 (E.D.N.Y. 2003) (“The NAACP contends that . . . large numbers of handguns are available to criminals, . . . that their availability endangers the people of New York . . . and that defendants negligently and intentionally failed to take practicable marketing steps that would have avoided or alleviated the nuisance.”).

<sup>8</sup> *Rev. Jesse Jackson Arrested at Gun Shop Protest*, FOXNEWS.COM (June 24, 2007), <http://www.foxnews.com/story/0,2933,286412,00.html>.

<sup>9</sup> 554 U.S. 570 (2008).

Supreme Court to uphold the District's gun ban.<sup>10</sup> In the wake of the Court's ruling that the District's regulations violated of the Second Amendment, the author of the Association's *Heller* brief has argued that diminishing *Heller* should be part of "any civil rights agenda."<sup>11</sup> This includes, for example, a proposal for limiting the constitutional right to keep and bear arms to enable isolated *de jure* gun prohibition in Black enclaves.<sup>12</sup>

Within the broader Black community general support for stringent gun laws can be inferred roughly from party allegiance. The Democratic Party has been a comfortable home for advocates of gun prohibition and stringent controls.<sup>13</sup> No group of voters has been more loyal to the modern Democratic Party than Blacks.<sup>14</sup>

Gun bans and other aggressive control measures promise a solution to the plague of gun violence, so in that sense, the *modern orthodoxy* is easy to understand. But on reflection it is also quite odd. First, because it is grounded on assumptions that are difficult to reconcile with the Black experience in America. Second, because it directly contradicts traditional practice, policy, and philosophy of the Black leadership and the broader Black community.

The modern orthodoxy is very difficult to square with the historic and well-earned Black distrust of the state. A competent and benevolent state that supplants the need for self-help is a core assumption of stringent gun laws.<sup>15</sup> But the assumption of government competence and benevolence—

<sup>10</sup> NAACP Amicus Curiae, *supra* note 3, at 4, 31.

<sup>11</sup> Michael B. de Leeuw et al., *Ready, Aim, Fire?* District of Columbia v. *Heller and Communities of Color*, 25 HARV. BLACKLETTER L.J. 133, 137 (2009).

<sup>12</sup> *See id.*

<sup>13</sup> For example, the Violent Crime Control and Law Enforcement Act of 1994 contained a provision, commonly known as the Assault Weapon Ban, which made it "unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon." H.R. 3355, 103d Cong. § 110102 (1994), available at <http://www.gpo.gov/fdsys/pkg/BILLS-103hr3355enr/pdf/BILLS-103hr3355enr.pdf>; Brad Plumer, *Everything You Need to Know About the Assault Weapons Ban*, in *One Post*, WASH. POST WONKBLOG (Dec. 17, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/12/17/everything-you-need-to-know-about-banning-assault-weapons-in-one-post/>. The bill passed with overwhelming Democratic support: 188 House Democrats voted for the bill, and 64 against, while only 46 Republicans voted for it, and 131 against. FINAL VOTE RESULTS FOR ROLL CALL 416 (1994), available at <http://clerk.house.gov/evs/1994/roll416.xml>.

<sup>14</sup> Since 1964, the percentage of blacks identifying with the Democratic Party has been consistently over 70%, and well over 80% of blacks have voted for the Democratic candidate in every Presidential election during that time. *Blacks and the Democratic Party*, FACTCHECK.ORG (Apr. 18, 2008), <http://www.factcheck.org/2008/04/blacks-and-the-democratic-party/>. In the 2008 presidential election, Barack Obama won 95% of the black vote. Reilly Dowd, *Young African-Americans Support President Obama, but Turnout Not a Guarantee*, ABCNEWS.GO.COM (Sept. 23, 2012), <http://abcnews.go.com/Politics/african-american-youth-standing-president-obama/story?id=17274120#.UUt9Mr8Zfw>.

<sup>15</sup> There are many manifestations of this. One of the most evident was the legislation overturned in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Heller* invalidated armed self-defense by

particularly competence and benevolence of state and local law enforcement—is foreign to the Black experience. Blacks have justifiably distrusted the state and have suffered more than most groups from state failure and malevolence. Even today, the Black community complains about the inability or unwillingness of state and local governments to serve and protect Blacks. This includes biting criticism of local policing.<sup>16</sup>

Moreover, in terms of practice and policy, armed self-defense has been an essential private resource for Blacks. Not only have many in the leadership owned, carried, and used firearms for self-defense, as a matter of policy, Blacks from the leadership to the grassroots have supported armed self-defense by maintaining a crucial distinction between political violence (which was condemned as counterproductive to group advancement) and self-defense against imminent threats (for which there was no substitute).<sup>17</sup>

This Article elaborates these critiques of the modern orthodoxy. Part I shows that trusting the state for personal security is incompatible with the Black experience. Part II shows that the modern orthodoxy is incompatible with traditional practice and policy. Section A of Part II illustrates the tradition of firearms ownership and armed self-defense in the Black community. Section B shows how traditionally, Blacks in the leadership and at the grassroots, sustained and supported armed self-defense as a matter of policy by insisting upon a fundamental distinction between private self-defense against imminent threats and collective political violence that was considered damaging to group goals. Section B contends that this traditional support for armed self-defense was fundamentally a response to state failure and impotence which continues to this day. This continuing state failure and impotence pose a fundamental challenge to the modern orthodoxy.

The evident response to the arguments and implications of Part II is that practice and policy formed in the context of Black Codes; that Jim Crow and racist terrorism are no longer relevant. Black support for stringent gun control, the argument goes, is dictated by modern concerns

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outlawing handguns and requiring that sporting long guns be kept unloaded, disassembled and locked away separately from the ammunition. *Heller*, 554 U.S. at 574–75, 635; see also H. Richard Uviller & William G. Merkel, *Muting the Second Amendment: The Disappearance of the Constitutional Militia*, in *THE SECOND AMENDMENT IN LAW AND HISTORY* 149, 176–77 (Carl T. Bogus ed., 2000) (claiming that the militia transformed into the National Guard); Dennis A. Henigan, *Guns and the Judiciary*, in *GUNS AND THE CONSTITUTION: THE MYTH OF SECOND AMENDMENT PROTECTION FOR FIREARMS IN AMERICA* 1, 14, 19 (1995) (arguing that the federally controlled National Guard has obviated the need the militia of the whole).

<sup>16</sup> See *infra* notes 472–74.

<sup>17</sup> See *infra* notes 269–70 and accompanying text (noting that Frederick Douglass advocated armed resistance to slave catchers).

about Black-on-Black violence in the urban underclass.<sup>18</sup> Traditional worries about state failure or impotence, it is said, are outdated.

Part III engages the “things have changed” defense of the modern orthodoxy. Section A charts the departure of modern orthodoxy from traditional practice and policy. Section B argues that the failure and inherent limits of government that fueled the traditional support for firearms ownership and armed self-defense remain salient. Part III argues that Black political advances have not diminished the problems of imminent threats and finite resources that constrain government’s ability to protect Blacks from criminal violence.<sup>19</sup> Part III concludes that the modern orthodoxy is philosophically at odds with the Black experience in America. Part IV argues that the modern orthodoxy rests on dubious assumptions about the risks and utilities of private firearms and submerges the legitimate self-defense interests of the sober mature members of the community. Part IV invites reassessment of the modern orthodoxy with a keener focus on the interest of innocents.

## II. STATE FAILURE AND THE BLACK EXPERIENCE

*We have done our level best . . . , we have scratched our head to figure out how we can eliminate the last one of them. We stuffed ballot boxes. We shot them. We ARE NOT ASHAMED OF IT.*

–Ben “Pitchfork” Tillman,  
United States Senator from South Carolina, 1910<sup>20</sup>

*The injustices endured by Black Americans at the hands of their own government have no parallel in our history, not only during the period of slavery but also in the Jim Crow era that followed.*

Jim Webb  
United States Senator from Virginia  
July 2010<sup>21</sup>

<sup>18</sup> See de Leeuw et al., *supra* note 11, at 167 (“In the District, . . . the handgun ban was a means chosen by an African-American electorate to prevent violence against its own members.”).

<sup>19</sup> Daisy Bates was President of Arkansas Conference of NAACP Branches. DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK* 47 (1963). She and her husband were central figures in the 1957 Little Rock Integration crisis. They published a black newspaper, the *Arkansas State Press*, and editorialized against violations of the Supreme Court’s desegregation rulings. See *id.* at 33, 49–50 (describing how the Little Rock School Board resisted immediate integration despite the lack of violence at institutions that had been integrated). Bates was advisor to the Little Rock Nine, when they attempted to enroll at Little Rock Central High School. See *id.* at 62–65, 88–90 (Bates counseled the parents of black children before their enrollment, and organized their travel to the school).

<sup>20</sup> RAYFORD W. LOGAN, *THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON* 99–100 (1965) (alterations in original).

<sup>21</sup> See James Webb, *Diversity and the Myth of White Privilege*, WALL ST. J., July 23, 2010, at A17 (arguing that affirmative action cannot be justified despite the unparalleled injustices suffered by black Americans).



Advocates of stringent supply-side, gun control oppose armed self-defense on the view that personal security is best provided to a disarmed citizenry by armed agents of government.<sup>22</sup> This dictates a dependency on the competence and benevolence of government at odds with the Black experience in America.

Black distrust of the state is well earned. The early parts of the story are self-evident. There is general agreement that the enshrinement of slavery is a stain on the Republic. It is a profound irony, that with so much ink spilled by the founding generation about the reasons to distrust government and the need for systemic restraints on government power, the constituency with the most glaringly evident reason to distrust the state was held in bondage.

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<sup>22</sup> The modern gun control movement has long argued that the only legitimate reasons for firearms ownership is sport. While some have urged blanket disarmament, the primary focus has been on handguns, deemed generally non-sporting, might be banned. Some organizations have urged a ban on firearms of all types.

There is little sense in gun registration. What we need to significantly enhance public safety is domestic disarmament . . . Given the proper political support by the people who oppose the pro-gun lobby, legislation to remove the guns from private hands, acts like the legislation drafted by Senator John Chafee [to ban handguns], can be passed in short order. . . . Domestic disarmament entails the removal of arms from private hands.

AMITAI ETZIONI & STEVEN HELLEND, COMMUNITARIAN NETWORK, THE CASE FOR DOMESTIC DISARMAMENT (1992), available at [http://www.gwu.edu/~ccps/pop\\_disarm.html](http://www.gwu.edu/~ccps/pop_disarm.html).

Many in the movement have advocated regulations of the type recently enforced in Washington D.C. as a model of sensible gun control.

A gun-control movement worthy of the name would insist that President Clinton move beyond his proposals for controls—such as expanding background checks at gun shows and stopping the import of high-capacity magazines—and immediately call on Congress to pass far-reaching industry regulation like the Firearms Safety and Consumer Protection Act introduced by Senator Robert Torricelli, Democrat of New Jersey, and Representative Patrick Kennedy, Democrat of Rhode Island. Their measure would give the Treasury Department health and safety authority over the gun industry, and any rational regulator with that authority would ban handguns.

Josh Sugarmann, Exec. Dir. of the Violence Pol'y Ctr., *Dispense with the Half Steps and Ban Killing Machines*, HOUS. CHRON., Nov. 5, 1999, at 45A.

For the counterpoint, see David B. Kopel et al., *The Human Right to Self-Defense*, 22 BYU J. PUB. L. 43, 54–57, 159–164 (2007) (critiquing a report for the Human Rights Council prepared by Special Rapporteur Barbara Frey claiming that people have a human right to gun control under the theory that gun control legislation is part of the due diligence required by international law); see also Human Rights Council, Sub-Comm'n on Promotion & Prot. of Human Rights, Prevention of Human Rights Violations Committed with Small Arms and Light Weapons, 58th Sess., U.N. Doc. A/HRC/Sub.1/58/27 (July 27, 2006) (prepared by Barbara Frey), available at <http://www.poa-iss.org/CASAUplod/Members/Documents/11@Frey%20Final%20Report%202006.pdf> (arguing that self-defense is not a human right but that there is an international human rights law obligation to prevent “reasonably foreseeable private sphere violations carried out with small arms” in which States “must take steps to minimize armed violence between private actors”).

Under the system of constitutionally endorsed slavery, government at all levels was overtly hostile to Blacks. We are familiar with the provisions of the original United States Constitution, the Supreme Court cases, and a century of delay in making good the promise of Reconstruction<sup>23</sup> that might leave Blacks understandably ambivalent about the suggestion to entrust their lives to the state.<sup>24</sup> But it is the details of physical threats to Black people at the grassroots that underscore the point.<sup>25</sup>

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<sup>23</sup> See, e.g., Lyndon B. Johnson, Remarks of the President to a Joint Session of Congress (Mar. 15, 1965), in *THE STRUGGLE FOR RACIAL EQUALITY: A DOCUMENTARY RECORD* 208, 212 (Henry Steele Commager ed., 1972) (“A century has passed, more than a hundred years since equality was promised. And yet the Negro is not equal. A century has passed since the day of promise. And the promise is unkept.”); see also Clayton E. Cramer, Nicholas J. Johnson & George A. Mocsary, “*This Right Is Not Allowed by Governments that Are Afraid of the People*”: *The Public Meaning of the Second Amendment When the Fourteenth Amendment Was Ratified*, 17 *GEO. MASON L. REV.* 823, 852–54 (2010) (discussing the post-war legislation restricting freedmen’s access to guns).

<sup>24</sup> The validation of negro slavery in the “other Persons” and “such Persons” in Article I §§ 2 and 9 of the original Constitution are familiar. U.S. CONST. art. I, § 1, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2; U.S. CONST. art. I, § 9, cl. 1. So is the Supreme Court’s work in *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld the constitutionality of a state statute requiring separation of the races in train travel) and *Dred Scott v. Sandford*, 60 U.S. 393 (1856), which held that the black plaintiff was not a citizen and therefore was not entitled to sue. Less well known are *Hodges v. United States*, 203 U.S. 1, 9 (1906), which held that racist intimidation of Black laborers was outside the jurisdiction of federal courts, *Pace v. Alabama*, 106 U.S. 583, 585 (1883), which held the enhanced punishment for interracial fornicators constitutional, *Virginia v. Rives*, 100 U.S. 313, 322–23 (1880), which held that all-white juries for Black defendants was constitutional, and *United States v. Cruikshank*, 92 U.S. 542, 559 (1875), which remanded with instructions to discharge the defendants after indictment of members of a white mob who attacked a largely unarmed group of freedmen.

<sup>25</sup> For the view that state malevolence and neglect exacerbated intra group violence by Blacks who were wary about entanglements with the white power structure, see, e.g., HORTENSE POWDERMAKER, *AFTER FREEDOM: A CULTURAL STUDY IN THE DEEP SOUTH* 173–74 (1939). The contemporary response to this neglect stands in notable contrast to the modern complaints about incarceration of Black criminals. Consider for example the efforts of the Black leaders from the Mississippi Delta on the Committee for Better Citizenship. The goal of the Committee was to “ensure greater punishment for black criminals who committed offenses against blacks.” DAVID T. BEITO & LINDA ROYSTER BEITO, *BLACK MAVERICK: T.R.M. HOWARD’S FIGHT FOR CIVIL RIGHTS AND ECONOMIC POWER* 67–68 (2009). Physician, entrepreneur, and Delta civil rights leader, T.R.M. Howard complained that failure of the state to punish Black-on-Black crime was another indictment of separate but equal, arguing that the “greatest danger to Negro life in Mississippi is not what white people do to Negroes but what the courts of Mississippi let Negroes of Mississippi do to each other.” *Id.* at 73 (internal quotation marks omitted). Black-on-Black murder for example was likely to go unaddressed if the perpetrator lived on “a big plantation and is a good worker and especially, if he is liked by white people, the chances are that he will come clear of his crime.” *Id.* (internal quotation marks omitted). E. Franklin Frazier’s 1924 account strikes a similar cord.

The main difficulty in the South today is that white people have not attained a conception of impersonal justice. In the South a Negro who is the favorite of an influential white man can kill another Negro with impunity. On the other hand, a white man can kill any Negro without any fear of punishment, except where he kills out of pure blood-thirstiness a “good nigger.” The killing of a white man is always the signal for a kind of criminal justice resembling primitive tribal revenge.

The case for distrust was not so much different after slavery as before. As Freedmen attempted to establish themselves politically, they encountered violence at the hands of ex-confederates. The disappointing government response is well chronicled. Episodes in Memphis and New Orleans are illustrative. In 1866 Blacks and white Republicans attempted to convene a state constitutional convention.<sup>26</sup>

[At the convention hall] they were attacked and slaughtered by a mob led by the city police, a force largely made up of militant Confederate veterans. . . . The United States Army units stationed in New Orleans failed to take any effective action to protect the convention, and the Johnson administration in Washington ignored warnings that violence was likely.<sup>27</sup>

Around the same time, white mobs in Memphis invaded the Black community.<sup>28</sup> In the lead were prominent whites including the Tennessee Attorney General and a state judge. Forty-six Blacks and two whites were killed.<sup>29</sup>

One of the factors motivating the protections under the Freedman's Acts and the Fourteenth Amendment was the deprivation of Black civil rights, including the right of Blacks to arm themselves for personal protection.<sup>30</sup> There is some temptation to mark the Reconstruction Era as a hinge point where Blacks could look to Washington for protection against hostile state and local governments. But by 1877, the Reconstruction experiment was nearly exhausted and compromised away.<sup>31</sup> In the decades

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E. Franklin Frazier, *The Negro and Non-Resistance*, 27 *CRISIS* 213, 213–14 (1924), reprinted in HERBERT APTEKER, 3 *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES*, 449, 451 (1973).

<sup>26</sup> HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 5 (1988).

<sup>27</sup> *Id.* at 6.

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.*

<sup>30</sup> See Cramer, Johnson & Mocsary, *supra* note 23, at 855–59 (“There is solid evidence that both supporters and opponents of the Fourteenth Amendment viewed the Second Amendment as an individual right—and in some cases, the opposition to the Fourteenth Amendment was driven by fear that it would preclude the Black Code provisions from disarming the freedmen.”).

<sup>31</sup> As author David Levering Lewis observed:

[By March of 1877,] the Republicans had frantically bartered just enough electoral votes in the bitterest, most corrupt election aftermath ever in order to hang on to the White House. In accordance with a deal in large part struck at Wormley House, the deluxe Washington hotel owned (ironically) by a black man, Rutherford Hayes's first act had been to call back most of the federal troops from the South while northern capitalists smacked their lips in anticipation of Congress's voting lavish subsidies for more transcontinental railroads. Henceforth, the white South would take care of its black people and the North would take care of most of the nation's

that followed, the party of Lincoln virtually abandoned Blacks, and Lily-White Republicans carried favor with the former rebels.<sup>32</sup>

Racist assaults on the Black community in Wilmington, North Carolina in 1898 illustrate that official complicity in racist violence could be good politics. John Spenser Bassett of Trinity College in Durham noted the irony that the prime instigator of the Wilmington violence, Alfred Waddell, was subsequently elected mayor.<sup>33</sup>

The Sheriff of Fulton County, Georgia, in the period following the Atlanta race riots of 1906, made clear his view of justice where Blacks were concerned: "Gentlemen, we will suppress these great indignities upon our fair wives and daughters if we have to kill every negro in a thousand miles of this place."<sup>34</sup>

Northern Blacks were not immune. In August of 1900, white mobs in New York City rolled over Blacks with "police both encouraging and participating in the violence, after a violent conflict between a plainclothes policeman and the husband of a Black woman accused of soliciting."<sup>35</sup>

In many instances of brutality by the mob policemen stood by and made no effort to protect the Negroes who were assailed. They ran with the crowds in pursuit of their prey; they took defenseless men who ran to them for protection and threw them to the rioters, and in many cases they beat and clubbed men and women more brutally than the mob did.<sup>36</sup>

In the Pulitzer Prize winning, *Slavery by Another Name*, Douglas Blackmon details the southern system of convict labor under which the state was a fundamental threat to Blacks.<sup>37</sup> Blackmon captures the system this way:

On March 30, 1908, Green Cottenham was arrested by the sheriff of Shelby County, Alabama, and charged with "vagrancy." . . . After three days behind bars [he] was found guilty . . . and immediately sentenced to a thirty-day term of

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business. *The Nation* had said starkly what President Hayes had no need to say publicly about the African-American: "Henceforth, the nation, as a nation, will have nothing more to do with him."

DAVID LEVERING LEWIS, W.E.B. DU BOIS: BIOGRAPHY OF A RACE 163 (1993) (quoting ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 245 (1990)).

<sup>32</sup> KENNETH W. GOINGS, "THE NAACP COMES OF AGE": THE DEFEAT OF JUDGE JOHN J. PARKER 21 (1990).

<sup>33</sup> SHAPIRO, *supra* note 26, at 73.

<sup>34</sup> JOHN DITTMER, BLACK GEORGIA IN THE PROGRESSIVE ERA: 1900–1920, at 131 (1977).

<sup>35</sup> SHAPIRO, *supra* note 26, at 94.

<sup>36</sup> *Id.*

<sup>37</sup> DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II, at 8 (2009).

hard labor. Unable to pay the array of fees assessed on every prisoner[,] . . . Cottenham's sentence was extended to nearly a year of hard labor.

The next day, Cottenham, the youngest of nine children born to former slaves in an adjoining county, was sold. Under a standing arrangement between the county and a vast subsidiary of the industrial titan of the North—U.S. Steel Corporation—the sheriff turned the young man over to the company for the duration of his sentence. In return, the subsidiary, Tennessee Coal, Iron & Railroad Company, gave the county \$12 a month to pay off Cottenham's fine and fees. What the company's managers did with Cottenham, and thousands of other black men they purchased from sheriffs across Alabama, was entirely up to them.<sup>38</sup>

Blackmon chronicles the horrific treatment of Black men forced into this system throughout the south on charges like "idleness," "using obscene language," "selling cotton after sun set" and "violating contract" with white employers in places where true crime was "almost trivial."<sup>39</sup> By some modern sensibilities, the firearms charges that landed Blacks into this system were not trivial. But that modern assessment is vexing here.

Across the South, but nowhere more intensely than in Alabama, *public campaigns were under way to ban the possession of firearms by any African American*. In an era when great numbers of southern men carried sidearms, the crime of carrying a concealed weapon—enforced almost solely against black men—would by the turn of the century become one of the most consistent instruments of black incarceration. The larger implications of disarming black men, at a time when they were simultaneously being stripped of political and legal protections, were transparent.<sup>40</sup>

In this context, the state earned not just Black distrust but fear. As much as any racist terrorist, the state was simply a menace.<sup>41</sup> Indeed, gauged by the number of direct victims of the convict labor system, the state was an even greater threat than terrorist groups like the Klan.

[T]he records demonstrate the capture and imprisonment of

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<sup>38</sup> *Id.* at 1–2.

<sup>39</sup> *Id.* at 69, 79, 99.

<sup>40</sup> *Id.* at 81–82 (emphasis added).

<sup>41</sup> See *id.* at 99 ("At the end of the 1880s, thousands of black men across the South were imprisoned in work camps only for violations of the new racial codes, completely subjective crimes, or no demonstrable crime at all.").

thousands of random indigent citizens, almost always under the thinnest chimera of probable cause or judicial process. The total number of workers caught in this net had to have totaled more than a hundred thousand and perhaps more than twice that figure. Instead of evidence showing black crime waves, the original records of county jails indicated thousands of arrests for inconsequential charges or for violations of laws specifically written to intimidate blacks—changing employers without permission, vagrancy, riding freight cars without a ticket, engaging in sexual activity—or loud talk—with white women. . . . Hundreds of forced labor camps came to exist, scattered throughout the south—operated by state and county governments, large corporations, small-time entrepreneurs, and provincial farmers. . . . Where mob violence or the Ku Klux Klan terrorized black citizens periodically, the return of forced labor as a fixture in black life ground pervasively into the daily lives of far more African Americans.<sup>42</sup>

The idea that the state was a menace rivaling the Klan tempts a false dichotomy that obscures government complicity in the “private” terrorism of the lynch mob. “Not only did sheriffs and jailers often willingly turn Black victims over to the lynchers, but officers of the law frequently joined the mob.”<sup>43</sup> The record is tragically thick with examples of almost unbelievable lynch mob barbarism and the striking failure of government to intercede. A stark example is President William Howard Taft’s failure in 1911 even to acknowledge the NAACP’s special message requesting action in response to a particularly inventive lynching.<sup>44</sup> The white citizens of Livermore, Kentucky dragged a Black man accused of killing a white from his jail cell to the town opera house, where the crowd paid admission to fire shots at him. “Those who bought orchestra seats had the privilege of emptying their six shooters at the swaying form above them, but the gallery occupants were limited to one shot.”<sup>45</sup>

The shameful record of government institutions at every level on this score is highlighted by the submission of the Universal Negro Improvement Association to the 1919, Paris Peace Conference. In what

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<sup>42</sup> *Id.* at 7.

<sup>43</sup> SHAPIRO, *supra* note 26, at 31. The claim that lynching was just a response to Black criminality is unconvincing. Victims included the father of a boy who jostled white women, a man who beat a white in a fight, and the wife and son of an accused rapist. See, e.g., DITTMER, *supra* note 34, at 131–40 (describing examples of lynchings that were not the result of Black criminality and the effects the lynchings had on the communities).

<sup>44</sup> GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY, 1865–1940, LYNCHINGS, MOB RULE, AND “LEGAL LYNCHINGS” 118–19 (1990).

<sup>45</sup> *Id.*

sounds like the plea of modern refugees from barbaric, third world governments, the UNIA representative, prayed for intervention by the civilized world.

We of North America, beg to lay before you the awful institutions of lynching and burning at the stake of our men, women and children by the white people of the country, which institutions are in direct contravention of the established codes of civilization. We ask your help and interference in the stopping of these outrages, which cannot be regarded as national or domestic questions, but as international violations of civilized human rights.<sup>46</sup>

Although official hostility to Blacks had often been a point of division between political parties, in some cases the stance was entirely bipartisan. In the run up to the 1921 Tulsa riots, Klansmen appeared on both the Democratic and Republican slates.<sup>47</sup>

Black migration from the South to Northern industrial centers was often met with official hostility and government sanctioned violence. The infamous 1917 race riot in East St. Louis, Illinois, incited by employment of Black strikebreakers, prompted investigation by a special congressional committee.<sup>48</sup> It concluded that the police had become "part of the mob by countenancing the assaulting and shooting down of defenseless negroes and adding to the terrifying scenes of rapine and slaughter."<sup>49</sup>

A. Philip Randolph placed the failure of the state to protect Blacks in a broader context. The root of the problem, he claimed, was capitalism itself.<sup>50</sup> "Lynching will not stop until Socialism comes . . . when the

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<sup>46</sup> 1 THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS 228, 308, 378-80 (Robert A. Hill ed., 1983).

<sup>47</sup> SCOTT ELLSWORTH, DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921, at 22 (1982) ("In the November 1922 elections . . . both the Republican and Democratic candidates for county attorney and sheriff were Klansmen.").

<sup>48</sup> Ben Johnson et al., *Report of the Special Committee Authorized by Congress to Investigate the East St. Louis Riots*, in THE POLITICS OF RIOT COMMISSIONS 1917-1970, at 59, 59 (Anthony Platt ed., 1971) (the congressional committee was appointed "for the purpose of making an investigation of the East St. Louis riots which occurred on May 28 and July 2, 1917").

<sup>49</sup> *Id.* at 70.

<sup>50</sup> Randolph took a different approach from Black civil rights groups. For example, in an analysis urging that lynching required an international response, the Messenger criticized,

No, lynching is not a domestic question, except in the rather domestic minds of Negro leaders, whose information is highly localized and domestic. The problems of the Negroes should be presented to every nation in the world and this sham democracy, about which American's prate, should be exposed for what it is: a sham, a mockery, a rape on decency, and a travesty on common sense. When lynching gets to be an international question, it will be the beginning of the end.

motive for promoting race prejudices is removed, viz., profits.”<sup>51</sup> Randolph argued that the reasons for government failure to protect Negroes were inherent and could not be resolved by more words claiming a change in policy. “Don’t be deceived by any capitalist bill to abolish lynching; if it became a law, it would never be enforced. Have you not the Fourteenth Amendment which is supposed to protect your life, property, . . . and guarantee you the vote?”<sup>52</sup> Randolph’s short-term remedy was reciprocal violence in self-defense.<sup>53</sup> He reconciled this with the general program of pacifism, noting that pacifism controlled “only on matters that can be settled peacefully.”<sup>54</sup>

The familiar claim that government officials were complicit in lawless violence against Blacks was underscored by the NAACP’s investigation of a 1926 lynching in Aiken, South Carolina. The sheriff and the jailer had assisted the mob in removing three Blacks from a local jail to a nearby tourist camp, where, in front of a crowd of 2,000, they were killed.<sup>55</sup> In attendance were members of the state legislature and other local politicians.<sup>56</sup> The NAACP’s James Weldon Johnson argued that the federal government bore part responsibility. The Senate’s refusal to act on the Dyer Anti-Lynching Bill he claimed, “was equivalent to serving notice on the lynchers that they could pursue their pastime virtually unmolested.”<sup>57</sup> Johnson’s mentor, Charles W. Anderson, leveled a similar criticism at Woodrow Wilson’s policy of segregating the federal workforce. Wilson’s policy had “the reflex influence” of giving anti-Negro elements across the country the feeling that they would not be punished by federal authorities.<sup>58</sup>

The high-water mark of southern lynching is contestable. On one view, it is measured by lynchings per year, with declining rates evidence of progress. On another view, the impact is cumulative, with every new, dangling, burned corpse an affirmation that Blacks lived in a state of terror. The cumulative view reflects better the impact on the Black psyche and expectations. “Translated from statistical abstraction, . . . perhaps most of the southern Black population, had witnessed lynching in their own

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<sup>51</sup> A. Philip Randolph & Chandler Owen, *Lynching: Capitalism Its Cause, Socialism Its Cure*, in *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* 85, 90, 91 (August Meier et al. eds., 2d ed. 1971).

<sup>52</sup> *Id.* at 91.

<sup>53</sup> *Id.* at 96.

<sup>54</sup> *Id.* at 97.

<sup>55</sup> I.A. NEWBY, *BLACK CAROLINIANS: A HISTORY OF BLACKS IN SOUTH CAROLINA FROM 1895 TO 1968*, at 242–45 (1973); Walter White, *The Shambles of South Carolina*, *CRISIS*, Dec. 1926, at 72–75, *CRISIS*, Jan. 1927, at 141–42.

<sup>56</sup> White, *supra* note 55, at 141–42.

<sup>57</sup> *Id.*; see also NAACP Column, *CRISIS*, Jan. 1927, at 141–42.

<sup>58</sup> 1 CHARLES FLINT KELLOGG, *NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE* 166 (1967).



communities or knew people who had, knew the terror that struck the community when the mob was whipped to frenzy.”<sup>59</sup> A cumulative assessment of Black distrust of the state undercuts modern claims that the tradition of distrust is no longer salient because things have changed.

While the stereotypical Southern sheriff was a common locus of Black distrust, other officials contributed generously. Witness the arguments of the prosecutor in the trial of Ward Rodgers, a white union activist arrested in Arkansas on charges of anarchy and blasphemy. Rodger’s offense, the prosecutor argued, was teaching “niggers” to read and calling Black men “mister.”<sup>60</sup>

More striking is the 1935 report of Robert Reed, a white volunteer who was arrested for attending a meeting of Black sharecroppers. The meeting was broken up by armed whites. They took Reed before a local judge who pressed him on why a white man was dealing with “niggers.”<sup>61</sup>

He told us about how they had a lot of black politicians in Arkansas up until the turn of the century, and hundreds had been driven into the Mississippi River, and that a lot of lives were lost then, and the whole thing was likely to occur over again if we persisted in the sort of activities we were in.<sup>62</sup>

As the United States entered World War II, Black soldiers found themselves instruments of a government they still had ample reasons to distrust and even fear. In some cases that fear was compounded by hostility from white soldiers and superior officers.<sup>63</sup> In other cases it was instigated by state and local authorities enforcing racist local norms.<sup>64</sup>

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<sup>59</sup> SHAPIRO, *supra* note 26, at 32.

<sup>60</sup> DAVID EUGENE CONRAD, *THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL* 157 (1965).

<sup>61</sup> H.L. MITCHELL, *MEAN THINGS HAPPENING IN THIS LAND* 63 (1979).

<sup>62</sup> *Id.*

<sup>63</sup> For example, Black Soldiers stationed at Marcus Hook, Pennsylvania encountered a notice from their white commander that “Any cases between white and colored males and females, whether voluntary or not is considered rape and during time of war the penalty is death.” ROI OTTLEY, “NEW WORLD A-COMING”: *INSIDE BLACK AMERICA* 314 (1943). At Fort Dix, New Jersey, a gun battle between Black troops and MP’s intent on enforcing southern Jim Crow customs led to three dead and five wounded. *Id.* at 312–13.

<sup>64</sup> A Black member of the 94th Engineers Battalion stationed in Camp Custer Arkansas in 1941 reported that a group of Black soldiers from the units abandoned maneuvers and fled for safety after being threatened by state troopers and armed civilians. *Id.* at 310.

As we were walking along the highway, . . . we saw a gang of white men with guns and sticks and white state troopers were with them. They told us to get the hell off the road and walk in the mud at the side of the highway. . . . [T]he trooper told [our white Lieutenant] to get them blacks off the highway before [he] leave[s] ‘em [sic] laying there. Then out of a clear blue sky the state trooper slapped the white lieutenant.

Florence Murray's account of racial violence in the armed forces<sup>65</sup> describes the concerns that prompted protests by the NAACP about beating, mobbing, and lynching of Blacks in uniform on military bases and in host communities.<sup>66</sup>

On the civilian front, Thurgood Marshall's report of the government response to the 1943 Detroit riots<sup>67</sup> fueled continuing Black distrust of the state.<sup>68</sup> Marshall's particular focus on the culture within the Detroit police department highlights a recurring complaint that still resonates in Black communities.<sup>69</sup> A commission appointed by the Governor of Michigan was unsympathetic to Marshall's view.<sup>70</sup> But an assessment by a coalition including General William Gunther, the YMCA, and the Federal Council of Churches confirmed and condemned widespread police misconduct and abuse of Blacks.<sup>71</sup>

On another count, reaction to the Detroit riots, even at federal level, was a source of worry. On July 15, 1943, Attorney General Francis Biddle wrote to President Roosevelt,

[T]hat careful consideration be given to limiting, and in some

*Id.* at 310–11 (internal quotation marks omitted). After nightfall, the Black soldiers abandoned their maneuvers and fled the area by a variety of means calculated to avoid contact with local whites. *Id.* at 311.

<sup>65</sup> THE NEGRO HANDBOOK, 1946–1947, at 347–56 (Florence Murray ed., 1947) (describing, for example, the Port Chicago mutiny in 1944, the Freeman Field disturbance in 1945, the mutiny at Mabry Field in May 1944, the Fort Devens case in March 1944, and the disturbances in Guam).

<sup>66</sup> *Id.*; Harvard Sitkoff, *Racial Militancy and Interracial Violence in the Second World War*, 58 J. AM. HIST. 666, 674–79 (1971).

<sup>67</sup> Frustration with a neglectful or malevolent state was reflected in the build up to the 1943 Detroit riots where “[a] slogan frequently heard among Blacks was ‘if you’ve got to die for democracy, lets die for it at home.’” SHAPIRO, *supra* note 26, at 312.

<sup>68</sup> See Thurgood Marshall, *The Gestapo in Detroit*, in RACIAL VIOLENCE IN THE UNITED STATES 140, 140–44 (Allen Day Grimshaw, ed., 1969) (“Much of the blood spilled in the Detroit riot is on the hands of the Detroit police department.”); WALTER WHITE & THURGOOD MARSHALL, WHAT CAUSED THE DETROIT RIOT? AN ANALYSIS 29–36 (1943) (“Some of the Negroes interviewed have refused to give details, and others have refused to sign statements for fear of reprisals from the local Police Department.”). Marshall argued that there was sufficient evidence to convene a grand jury to investigate “the nonfeasance and malfeasance of the police as a contributing factor in the Detroit riots.” *Id.* at 29. The actions of the police siding with white mobs to prevent Blacks from integrating the Sojourner Truth housing project justified the belief of “[w]hite hoodlums . . . that the Detroit police would act the same way in any future disturbances.” *Id.*

<sup>69</sup> See, e.g., Evan Perez & Devlin Barrett, *Police Officers Charged over Post-Katrina Deaths*, WALL ST. J. (July 14, 2010), <http://online.wsj.com/article/SB10001424052748704518904575365243282608862.html?KEYWORDS=new+orleans+police+shooting+Katrina> (reporting on a “racially charged case” of white police officers in connection with shootings in the aftermath of Hurricane Katrina that left mainly black victims dead or wounded, and which is viewed as “the most vivid and painful example of the confusion and lawlessness that pervaded the city after the storm”).

<sup>70</sup> See Marshall, *supra* note 68, at 141 (quoting Commissioner Witherspoon's remarks defending the police); see also WHITE & MARSHALL, *supra* note 68, at 13 (explaining that the “investigating committee reported that there was no necessity of a Grand Jury investigation”).

<sup>71</sup> SHAPIRO, *supra* note 26, at 318–19.

instances putting an end to Negro migrations into communities which cannot absorb them, either on account of physical limitations or cultural background. This needs immediate and careful consideration. . . . It would seem pretty clear that no more Negroes should move to Detroit.<sup>72</sup>

The particular worry about police culture is underscored by the 1946 police shooting of the Ferguson brothers in Freeport, Nassau County, New York.<sup>73</sup> The episode emphasizes the now familiar tension between Blacks and police that cannot be explained simply by reference to racist traditions of the Deep South. At the time, Freeport "like other Long Island towns was an outpost of segregation and racial exclusion."<sup>74</sup> The Fergusons were war veterans,<sup>75</sup> and they had been denied service by the manager of a local restaurant who called the police.<sup>76</sup> By the time police arrived, the Fergusons had left the restaurant.<sup>77</sup> They were later apprehended and, by some accounts, lined up and shot by police who claimed that one of the brothers pretended to be armed.<sup>78</sup> The Ferguson's were not armed and the aftermath precipitated a wave of protests, including the charge by the NAACP that "it is difficult to classify this double killing as anything but murder."<sup>79</sup> Prominent citizens called for an investigation, but no action was taken against the officers.<sup>80</sup> Herbert Shapiro observes that the Freeport shooting, "demonstrated that responsible public officials would not readily be moved to act to restrain racist police officers."<sup>81</sup>

By 1947, President Truman's Committee on Civil Rights reported that government involvement in the most egregious attacks on Blacks was attributable to state and local officials in the South:

Punishment of lynchers is not accepted as the responsibility of state or local governments in these communities. Frequently, state officials participate in the crime, actively or passively. Federal efforts to punish the crime are resisted. Condonation of lynching is indicated by the failure of some local law enforcement officials to make adequate efforts to

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<sup>72</sup> *Id.* at 321 (internal quotation marks omitted); *see also* EARL BROWN, WHY RACE RIOTS: LESSONS FROM DETROIT 3, 23 (1944) (criticizing Attorney General Biddle's handling of the Detroit riots); *Biddle Denies Migration Ban*, CRISIS, Sept. 1943, at 280 (discussing Biddle's denial of any plans to restrict "the migration of Negroes to war production centers").

<sup>73</sup> SHAPIRO *supra* note 26, at 356.

<sup>74</sup> *Id.* at 355.

<sup>75</sup> *Id.* at 356.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (internal quotation marks omitted).

<sup>80</sup> *Id.* at 356-57.

<sup>81</sup> *Id.* at 357.

break up the mob. It is further shown by failure in most cases to make any real effort to apprehend or try those guilty. If the federal government enters a case, local officials sometimes actively resist the federal investigation.<sup>82</sup>

Still, the report acknowledged that the Federal Government had important work left to do.<sup>83</sup> It was explicitly critical of the Justice Department's civil rights Section, Criminal Division.<sup>84</sup> Without intending it, the Report "furnished evidence about the federal government's complicity in subjecting [B]lacks to the continued threat of lynching, police brutality, and other forms of violence."<sup>85</sup> Later assessments of the FBI would underscore this point.<sup>86</sup>

A multifaceted story of state malevolence unfolded in 1946 surrounding an altercation in the Black community of "Mink Slide" in Columbia, Tennessee. The initial conflict was between a white radio repairman, William Fleming, a Black woman customer, Gladys Stephenson and her son.<sup>87</sup> For reasons that are disputed, Fleming kicked and slapped Stephenson.<sup>88</sup> Her son came to her aid.<sup>89</sup> Police arrived and arrested Stephenson and her son.<sup>90</sup> A lynch mob formed at the courthouse but was thwarted when Stephenson and her son were secreted away.<sup>91</sup> Fearing the boil-over, the local Black community took up arms and prepared for an attack.<sup>92</sup> The National Guard was called in.<sup>93</sup> The Guard arrested over one-hundred Blacks, two of whom died while in custody.<sup>94</sup> Among the protests was the NAACP's denunciation of the episode in *The Crisis* magazine.<sup>95</sup> The conflict was evidence "that Negroes, even in small communities like Columbia where they were outnumbered almost three to

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<sup>82</sup> TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS 20–23 (Charles Erwin Wilson, ed., 1947).

<sup>83</sup> See *id.* at 125–33 (explaining that the Civil Rights Section of the Department of Justice is "less effective and less self-assured" than it needs to be to sufficiently fulfill its purpose); see also *infra* notes 84–87 and accompanying text (discussing the criticism of the Justice Department's Civil Rights Section in failing to protect Blacks from continued violence).

<sup>84</sup> See SHAPIRO, *supra* note 26, at 370–71 (describing the report's assessment of the Justice Department).

<sup>85</sup> *Id.* at 371.

<sup>86</sup> See, e.g., CHARLES EVERS & ANDREW SZANTON, HAVE NO FEAR: THE CHARLES EVERS STORY 113–14, 130, 137 (1997).

<sup>87</sup> SHAPIRO, *supra* note 26, at 362.

<sup>88</sup> See *id.* (stating that Fleming kicked and slapped Stephenson during a dispute without explaining the cause of the dispute).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> See *id.* ("Fearing attack, members of the black community prepared to defend themselves.").

<sup>93</sup> See *id.* (describing the conduct of the police and guardsmen).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 363

one, do not intend to sit quietly and let a mob form, threaten, and raid their neighborhood.”<sup>96</sup>

Thurgood Marshall, then an NAACP attorney, was assigned to represent those arrested by the National Guard.<sup>97</sup> By some accounts, Marshall himself escaped lynching only because the Black community was already mobilized against mob violence.<sup>98</sup> Marshall was arrested “on trumped-up charges of drunk driving.”<sup>99</sup> Fearing for his life, fellow NAACP lawyers followed the arrest vehicle and alerted the community to the danger.<sup>100</sup> Harry Raymond reported, “Thurgood Marshall was the intended victim . . . the lynchers failed to carry out their plan because they are [sic] cowardly men and they knew we had the entire Columbia Negro community mobilized behind us.”<sup>101</sup>

Mississippi delta activist Reverend George Lee was less fortunate. In 1955, Lee was killed by a shotgun blast through his car window after receiving a written death threat to drop his name from the voting roll. The sheriff dismissed the death as a traffic accident.<sup>102</sup> Two Black doctors performed an autopsy and extracted lead buckshot from Lee’s face. The sheriff insisted the lead was dental fillings torn loose by the crash.<sup>103</sup> The NAACP appealed to Governor White to launch an investigation. White responded that he did not answer letters from the NAACP.<sup>104</sup>

Even after the Supreme Court declared “separate but equal” unconstitutional,<sup>105</sup> federal enforcement of that proposition against violent opposition shows that Blacks were properly suspicious of the ability or willingness of the federal government to protect or serve them. President Eisenhower’s ambivalent reaction to *Brown v. Board of Education*,<sup>106</sup> the

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<sup>96</sup> *Id.* (internal quotation marks omitted).

<sup>97</sup> *See id.* at 363–64 (explaining Marshall’s involvement in the case).

<sup>98</sup> *Id.* at 364.

<sup>99</sup> *Id.* The episode also fostered alliances with progressives; it prompted the formation of a National Committee for Justice in Columbia, Tennessee, organized by Eleanor Roosevelt and a variety of notable supporters. *Id.*; *see also* ROY WILKINS & TOM MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS* 188–89 (1982).

<sup>100</sup> SHAPIRO, *supra* note 26, at 364.

<sup>101</sup> *Id.*

<sup>102</sup> JACK MENDELSON, *THE MARTYRS: SIXTEEN WHO GAVE THEIR LIVES FOR RACIAL JUSTICE* 3–6 (1966).

<sup>103</sup> *Id.* at 6.

<sup>104</sup> BEITO & BEITO, *supra* note 25, at 108.

<sup>105</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>106</sup> Two years after *Brown*, Eisenhower said, “I think it makes no difference whether or not I endorse [*Brown*].” RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 753 (1975). He did not, however, explicitly oppose it, commenting that the important thing was to “help to bring about a change in spirit so that extremists on both sides do not defeat what we know is a reasonable, logical conclusion to this whole affair, which is recognition of equality of men.” *Id.* (internal quotation marks omitted); *see also* WILLIAM O. DOUGLAS, *THE COURT YEARS 1939–1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 120 (1980) (“Ike’s ominous silence on our 1954 decision gave courage to the racists who

threat of violent resistance to integration by Arkansas Governor, Orval Faubus,<sup>107</sup> and Eisenhower's initially tepid response to Faubus, left Roy Wilkins to complain in a letter to Adam Clayton Powell,

I have great difficulty speaking calmly about the role of President Eisenhower in this whole mess. He has been absolutely and thoroughly disappointing and disillusioning from beginning to end. . . . [T]he White House has abandoned its own Supreme Court and has abdicated leadership in a great moral crisis.<sup>108</sup>

America's goodwill ambassador, Louis Armstrong made his views on the matter public, calling Eisenhower gutless and informing a reporter that "he had no intention of touring the Soviet Union for the State Department."<sup>109</sup> "The way they are treating my people in the South, the government can go to hell. . . . The people over there [would] ask me what's wrong with my country. What am I supposed to say?"<sup>110</sup>

Daisy Bates reports one common man's rougher assessment of Eisenhower's belated proclamation authorizing the use of federal force to restrain Faubus.

Proclamation be damned! We've had the Constitution since 1789 and I doubt whether those goons who took over our town yesterday can read. Last night they came into our neighborhood and rocked our houses, breaking windows, and all that. We've taken a lot because we didn't want to hurt the chances of Negro kids, but I doubt whether the Negroes are going to take much more without fighting back. I think I'll take the rest of the day off and check my shotgun and make sure it's in working condition.<sup>111</sup>

Later, Daisy Bates' personal pleas for federal protection from firebombing and cross burning at her home fell on deaf ears. Federal

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decided to resist the decision ward by ward, precinct by precinct, town by town, and county by county.").

<sup>107</sup> TONY FREYER, *THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION* 103 (1984).

<sup>108</sup> WILKINS & MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS*, *supra* note 99, at 251. For a more extensive critique of presidential ambivalence, see EARL OFARI HUTCHINSON, *BETRAYED: A HISTORY OF PRESIDENTIAL FAILURE TO PROTECT BLACK LIVES* 3–4 (1996) ("Some presidents rationalized their hands-off policy by narrowly interpreting the federalist doctrine of state and national power. Some blamed their inaction on a Congress dominated by southern Democrats and northern Republican conservatives. . . . Some presidents merely said the statutes were too weak and vague to permit sustained and successful prosecutions of racial terrorism.").

<sup>109</sup> TERRY TEACHOUT, *POPS: A LIFE OF LOUIS ARMSTRONG* 331 (2009).

<sup>110</sup> *Id.* (internal quotation marks omitted).

<sup>111</sup> DAISY BATES, *THE LONG SHADOW OF LITTLE ROCK: A MEMOIR* 99 (1962) (internal quotation marks omitted).

officials declined to intervene on the argument that they had no jurisdiction.<sup>112</sup> Local law enforcement was hostile, and harassed the armed men of the community who had gathered to guard the Bates home.<sup>113</sup>

Mississippi activist, Doctor T.R.M. Howard, received a similar response after requesting protection from the FBI. The neglect here is more galling because one of the threats to his life came while federal agents were sitting in his office. The agents were investigating whether Howard had been the target of extortion.<sup>114</sup> The interview was interrupted by a caller who threatened to kill him if he continued to press for integration.<sup>115</sup> The FBI rebuffed Howard's request for protection, suggesting that he contact local authorities.<sup>116</sup> The Governor of Mississippi already had refused the NAACP's plea to investigate a shooting (ignored by the sheriff) with the retort that he did not answer letters from the NAACP.<sup>117</sup> Not surprisingly, Howard kept "a small arsenal" in his home.<sup>118</sup>

The reaction of the Eisenhower Administration to the daylight murder of Lamar Smith on the courthouse lawn in Brookhaven, Mississippi illustrates more of the same. Smith had been active in helping Black voters complete absentee ballots. There were many witnesses to the murder, but no one would testify. "The Eisenhower Administration showed little interest. Arthur Caldwell, the chief of the Civil Rights Division, refused to take jurisdiction because the killing involved a state and not a federal election."<sup>119</sup>

The voter registration efforts of the Congress of Racial Equality ("CORE") in the south were met hostility not just from the Klan but also directly from local officials. When local police threatened to lynch CORE's National Director, James Farmer, local African Americans smuggled Farmer out of town in a hearse.<sup>120</sup> The failure by local authorities in Jonesboro, Louisiana to protect CORE workers was one impetus for formation of the Black self-defense group, the Deacons for

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<sup>112</sup> *Id.* at 162–63 (demonstrating the lack of response and action from federal officials).

<sup>113</sup> *Id.* at 169.

<sup>114</sup> BEITO & BEITO, *supra* note 25, at 109.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 108.

<sup>118</sup> *Id.* at xiii.

<sup>119</sup> *Id.* at 113.

<sup>120</sup> JAMES FARMER, *LAY BARE THE HEART: AN AUTOBIOGRAPHY OF THE CIVIL RIGHTS MOVEMENT* 249–52 (1985); *see also* James J. Farmer, *A Night of Terror in Plaquemine, Louisiana*, 1963, in *THE STRUGGLE FOR RACIAL EQUALITY: A DOCUMENTARY RECORD* 134, 141–43 (Henry Steele Commager ed., 1972) (providing James Farmer's firsthand account of the plan to smuggle him out of Plaquemine, Louisiana after he received threats from local police); *Horse Troopers Scatter Negroes: Charge into Throng of 150 Marching at Plaquemine*, N.Y. TIMES, Sept. 1, 1963, at 41 (describing a police attack on a group of black marchers in Plaquemine, Louisiana).

Defense.<sup>121</sup>

In 1962, terrorists shot up the home of Ruleville, Mississippi voter and registration activist, Hattie Sisson.<sup>122</sup> Her granddaughter and a friend were injured. At the hospital, the mayor laid the blame on Sisson. “You done that yourself, trying to lay it on somebody else. You done that yourself, get out of here, go on out of here.”<sup>123</sup>

When, in 1963, a bomb was tossed into a house down the street from the childhood home of Condoleezza Rice, her father gathered the family with the intent of heading to the police station, but was reminded by his wife exactly who and where he was. “‘Are you crazy,’ she asked. ‘They [the police,] probably set off the thing in the first place.’”<sup>124</sup>

In 1964, activists in Halifax County North Carolina expected little assistance from the authorities after voter registration efforts prompted a wave of cross burnings and arson.<sup>125</sup> Bulletin boards at the county police station regularly posted advertisements for local Klan rallies.<sup>126</sup> John Salter, a Native American activist working for the Southern Conference Educational Fund, writes, “Fortunately we lived in the middle of a heavily armed Black community, with neighbors . . . who were protective.”<sup>127</sup>

While the glib collective memory of the Civil Rights era may be one of federal saviors and state and local villains, Simon Wendt reminds us,

Despite the disappearance of the three civil rights workers . . . and the violent attacks on black homes and churches, the federal government continued to claim that it could provide no protection. While Attorney General Robert Kennedy was deeply disturbed by the lawlessness in the state, he publicly stated that [these situations were] a “local matter for local law enforcement.” Since federal authority in the state was “very, very limited,” the administration could

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<sup>121</sup> The Deacons originated in Jonesboro Louisiana during the turmoil of the Civil Rights movement. LANCE HILL, *THE DEACONS FOR DEFENSE: ARMED RESISTANCE AND THE CIVIL RIGHTS MOVEMENT* 10–11 (2004). They were a working class armed self-defense movement that protected civil rights workers from Klan and police violence. SIMON WENDT, *THE SPIRIT AND THE SHOTGUN: ARMED RESISTANCE AND THE STRUGGLE FOR CIVIL RIGHTS* 67–68, 76 (2007) [hereinafter WENDT, *SELF-DEFENSE*]. They established “twenty-one communities, seventeen in the South and four in the North.” HILL, *supra*, at 167.

<sup>122</sup> KAY MILLS, *THIS LITTLE LIGHT OF MINE: THE LIFE OF FANNIE LOU HAMER* 46–47 (1993).

<sup>123</sup> *Id.* at 47 (internal quotation marks omitted).

<sup>124</sup> CONDOLEEZZA RICE, *EXTRAORDINARY, ORDINARY PEOPLE: A MEMOIR OF FAMILY* 92 (2010).

<sup>125</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 190; *see also* JOHN R. SALTER, JACKSON, MISSISSIPPI: AN AMERICAN CHRONICLE OF STRUGGLE AND SCHISM 240 (1979) (explaining that in response to so many of the threats regarding election work carrying a revolver was necessary).

<sup>126</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 190.

<sup>127</sup> Hunter Gray, *Material and Libertarian Well-Being—and Firearms*, *DEVELOPING ISSUES AND CONTEMPORARY COMMENT* (citing John R. Salter, *Civil Rights and Self Defense*, *AGAINST THE CURRENT*, July–Aug. 1988, at 24).



take no preventative police action against white terror. Neither the repeated calls for federal intervention by civil rights activists nor the official statement by a group of well-known law professors that existing law actually gave the administration the power to dispatch troops to Mississippi could jolt President Lyndon B. Johnson into action.<sup>128</sup>

These and other episodes show that trusting the state has been an absurd proposition during most of the Black experience in America.<sup>129</sup> Governments at all levels have been equal malefactors. In fits and starts, federal authority was extended to protect Blacks from abuse by state and local governments. Reconstruction efforts were short lived and it took another century before federal power was seriously redeployed to protect Blacks. That alone might be enough to argue that Blacks still should approach the recommendation to trust the state, with heavy skepticism.

It is plausible to argue that the radically transformative civil rights legislation of the 1960's signaled a change that justifies black reliance on the Federal Government for a variety of needs including basic personal security. But the glaring weakness of that view is that every day policing is still firmly in the hands of state and local governments<sup>130</sup> whose record of delivery of services, and security comes up far shorter and is even more deserving of black distrust.<sup>131</sup>

It is a peculiar irony that the modern orthodoxy urges Blacks to trust

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<sup>128</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 116–17 (footnotes omitted).

<sup>129</sup> While I have focused here on direct physical threats, the state also menaced Blacks more subtly as a propagandist of Black inferiority. An early example is the Post-Civil War work of the Provost Marshal General's Office. See JOSEPH T. GLATTHAAR, FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS 254 (1990) (discussing the Provost Marshal General's Office's compilations that concluded that "interracial breeding resulted in an inferior being"). Here, state agents purported to offer "scientific" corroboration for the full range of racist stereotypes including that "[f]ull blacks had elongated heels . . . resembling those of apes" and that interbred mulattoes were inferior beings less suited to the hardships of military service than full-blooded blacks. *Id.*; see also JOHN S. HALLER, JR., OUTCASTS FROM EVOLUTION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859–1900, at 19–20, 34 (1971) (providing evidence that "scientific" studies the government initiated during the Civil War worked toward institutionalizing racism against blacks and thus creating a deeper divide with the government).

<sup>130</sup> Charles Lane's treatment of the story leading to *United States v. Cruickshank* illustrates the point in vivid and gruesome detail. CHARLES LANE, THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION 20–22 (2008).

<sup>131</sup> See EVERS & SZANTON, *supra* note 86, at 4 ("You knew you were a nigger the first time you went driving with older Negroes and they warned you to avoid the highway patrol."); see also Nat'l Advisory Comm'n on Civil Disorders, *Detroit, in RACIAL VIOLENCE IN THE UNITED STATES* 205, 222 (Allen D. Grimshaw ed., 1969) (discussing how "alley courts," was "police slang for an unlawful attempt to make prisoners confess"); RODNEY STARK, POLICE RIOTS, COLLECTIVE VIOLENCE AND LAW ENFORCEMENT 98 (1972) (providing a description of police "fear [of] black people" and the fact that some "openly express violent hostility and prejudice toward them").

government for one of their most fundamental needs.<sup>132</sup> This is especially so considering the various recent episodes in which the state or its agents have earned the continuing distrust of Black people.<sup>133</sup>

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<sup>132</sup> This is not to deny that the choices posed during some of the darkest days of the freedom struggle provoked a similar irony. This is evident in Herbert Shapiro's characterization of Walter White's 1929 lynching study as "[r]eflecting a sense of urgency coupled with confidence in white liberalism." SHAPIRO, *supra* note 26, at 197. White decried the horror of the lynch mob but considered the incremental changes in public opinion and development of a stronger liberal coalition against lynching to be of immense importance. *Id.* at 197–98. White credited a variety of such organizations with contributing to the anti-lynching effort including the Commission on Interracial Cooperation (an island of southern liberalism headquarter in Atlanta), the Federal Council of Churches of Christ, and the Fellowship of Reconciliation. *Id.* at 198.

<sup>133</sup> See, e.g., William J. Barber, II et al., NAACP OF N.C., *Stop the Epidemic of Police Shootings of African Americans! Joint Statement on Charlotte Police Shootings* (June 2008), <http://carolinajustice.typepad.com/ncnaacp/2008/06/stop-the-epidem.html#more> (describing a revision of a set of recommendations to address the issue of police-minority citizen contacts in light of the death of a twenty-one year old African American by a Charlotte police officer); Victoria Cherrie, *NAACP Wants SBI to Look at Shootings*, CHARLOTTE OBSERVER (June 13, 2008), <http://www.charlotteobserver.com/2008/06/13/45145/naacp-wants-sbi-to-look-at-shootings.html> (explaining how NAACP leaders are pushing for legislation that would require the SBI to investigate all shootings that involve a police officer instead of having victims' families request the external investigation); Charles Ellison, *Tensions Persist in Portland Since Fatal Police Shooting of Unarmed Man*, POLITIC365 (Sept. 6, 2010, 4:00 PM), <http://politic365.com/2010/09/06/tensions-persist-in-portland-since-fatal-police-shooting-of-unarmed-black-man/> (providing an overview of the actions considered against a Portland, Oregon police officer who shot and killed an unarmed black man); Nikole Hannah-Jones, *Black Experience Propels Anger in Police Shooting of Aaron Campbell*, OREGONIAN (Feb. 19, 2010, 8:26 PM), [http://www.oregonlive.com/portland/index.ssf/2010/02/Black\\_experience\\_propels\\_anger.html](http://www.oregonlive.com/portland/index.ssf/2010/02/Black_experience_propels_anger.html) ("[M]any people in Portland are perplexed that large segments of Portland's African American community see the shooting death of Aaron Campbell through a racial lens. A white Portland police officer shot Campbell, an unarmed Black man, in the back during a confrontation at a Portland, Oregon police officer who shot and killed an unarmed black man); Howard Witt, *Race May Be Factor in Police Shooting of Unarmed Elderly Man*, CHI. TRIBUNE (Mar. 13, 2009), <http://www.chicagotribune.com/news/nationworld/chi-race-shootings-webmar13,0,7686526.story> ("Throat cancer had robbed the 73-year-old retired electric utility worker of his voice years ago, but family members said Monroe was clearly enjoying the commotion of a dozen of his grandchildren and great-grandchildren cavorting around him in the dusty, grassless yard. Then the Homer police showed up, two white officers whose arrival caused the participants at the black family gathering to quickly fall silent. Within moments, Monroe lay dead, shot by one of the officers as his family looked on. Now the Louisiana State Police, the FBI and the U.S. Justice Department are swarming over this impoverished lumber town of 3,800, drawn by the allegations of numerous witnesses that police killed an unarmed, elderly Black man without justification—and then moved a gun to make it look like the man had been holding it. 'We are closely monitoring the events in Homer,' said Donald Washington, the U.S. attorney for the Western District of Louisiana. 'I understand that a number of allegations are being made that, if true, would be serious enough for us to follow up on very quickly.' Yet the Feb. 20 Homer incident was not an isolated case. Across the nation, in four cases in recent months, white police officers have been accused of unprovoked shootings of African Americans in what civil rights leaders say are illustrations of the potentially deadly consequences of racial profiling by police. In the mostly white Houston suburb of Bellaire, a 23-year-old Black man sitting in his own SUV in the driveway of his parents' home was shot and wounded on New Year's Eve by police who mistakenly

The next section shows that this contradiction is not just an abstraction. Long experience with state failure has produced very explicit and direct Black support for armed self-defense in both practice and policy.

### III. TRADITIONAL PRACTICE AND POLICY

This Part examines the Black community's traditional approach to gun ownership and armed self-defense and shows that the modern orthodoxy contradicts traditional practice and policy. Section A details the tradition of Black ownership and deployment of arms for legitimate self-defense. Section B shows how that tradition translated into policy through the development and maintenance of a *strategic dichotomy* that insisted on the legitimacy of private self-defense while condemning political violence.

#### A. *The Traditional Practice and Advocacy of Firearms Ownership and Armed Self-Defense*

Previous scholarship has argued that the "racist roots" of many gun control laws are cause for apprehension about gun control in the modern era.<sup>134</sup> The modern orthodoxy responds that things have changed and in many ways that is uncontestable. But there is a separate component to this story that increases the burden on the modern orthodoxy. There is a robust tradition of direct support for firearms ownership and armed self-defense in the Black Community. That tradition poses a separate burden of explanation and reconciliation on the modern orthodoxy.

On the heels of the Civil War the nascent Black establishment pressed hard for the freedmens' civil right to keep and bear arms. In stark contrast to the modern era, they were joined by white progressives who saw the denial of Blacks' right to keep and bear arms for self-defense as continuing

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believed he had stolen the vehicle. The case is under investigation. In Oakland, a transit police officer has been charged with murder for allegedly shooting an unarmed black man in the back while he was restrained and lying face down on a train platform on New Year's Day. . . . The evidence is not merely anecdotal. The most recent national analysis from the Justice Department's Bureau of Justice Statistics shows that blacks and Hispanics were nearly three times as likely as whites to be searched by police—and blacks were almost four times as likely as whites to be subjected to the use of force.”).

<sup>134</sup> See Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 318–19 (1991) (providing an examination of how Second Amendment rights have been shaped within “subcultures in American society who have been less able to rely on state protection”); Robert J. Cottrol & Raymond T. Diamond, “*Never Intended to Be Applied to the White Population*”: *Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1309 (1995) (exploring the extent to which white Southerners tried to restrict Blacks' access to guns, even after the enactment of the Fourteenth Amendment); Clayton E. Cramer, *The Racist Roots of Gun Control*, 4 KAN. J.L. & PUB. POL'Y 17, 17 (1995) (arguing that the historical record reveals a long line of racism underlying gun control laws as “useful for keeping blacks and Hispanics ‘in their place’ and for quieting the racial fears of whites”).

infringement of the basic rights of citizenship.<sup>135</sup> The Black press reflected the sentiments of the community. The African Methodist Episcopal Church editorialized in the *Christian Recorder*:

The Charleston (S.C.) *Leader* says: We have several times alluded to the fact that the Constitution of the United States, guaranties to every citizen the right to keep and bear arms. Gen. Tilson, Assistant Commissioner, for Georgia has issued a circular in which he clearly defines the right. . . . “Any person, white or black, may be disarmed, if convicted of making an improper and dangerous use of weapons; but no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others. All men, without the distinction of color, have the right to keep arms to defend their homes, families or themselves.”

We are glad to learn that Gen. Scott, Commissioner for this State, has given freedmen to understand that they have as good a right to keep firearms as other citizens.<sup>136</sup>

A Black state convention petition to Congress strikes a similar cord.

We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass and act to deprive us or [sic] arms be forbidden, as a plain violation of the Constitution.<sup>137</sup>

Practice among the budding black intellectual class suggests that interest in the right to keep and bear firearms was more than philosophical. By the mid-1880's, with lynchings on the rise and even incidental interracial encounters potentially hazardous, “[m]any [Fisk] students went about armed when they left campus to go into [Nashville].<sup>138</sup> Coming of age a generation later, storied black writer Zora Neal Hurston, in a similar assessment of her environment, “packed a chrome plated pistol” as she traveled throughout the south collecting Negro folktales.<sup>139</sup>

Racist terrorism that wrested political power from North Carolina blacks in the 1898 election raised the public call for black self-defense. At a protest rally at the Fifth Avenue Baptist Church in Washington, D.C.,

<sup>135</sup> See, e.g., Cramer, Johnson & Mocsary, *supra* note 23, at 831 (describing the concerns about disarmament of freedmen animating reconstruction era legislation and the Fourteenth Amendment).

<sup>136</sup> Editorial, *Right to Bear Arms*, CHRISTIAN RECORDER, Feb. 24, 1866, at 29–30.

<sup>137</sup> 2 PROCEEDINGS OF THE BLACK STATE CONVENTIONS, 1840–1865, at 302 (Philip S. Foner & George E. Walker eds., 1980).

<sup>138</sup> LEWIS, *supra* note 31, at 67.

<sup>139</sup> VALERIE BOYD, WRAPPED IN RAINBOWS: THE LIFE OF ZORA NEALE HURSTON 144–45 (2003).

Colonel Perry Carson urged blacks to “[p]repare to protect yourselves; the virtues of your women and your property. Get your powder and your shot and your pistol.”<sup>140</sup> The *Washington Post* expressed alarm that so sensible a man as Carson had voiced such sentiments.<sup>141</sup>

Public statements by Black clergy and newsmen reflected the power of the self-defense impulse, even where there was little hope of prevailing. In the *Cleveland Gazette*, Reverend C. O. Benjamin celebrated the heroism of a Black man in Mississippi who resisted his white assailants. “The Negros should stand like men . . . if the White man uses the torch and the assassin’s knife let the Negro do the same.”<sup>142</sup> Speaking before the Afro-American Press Association in 1901, W.A. Pledger of the *Atlanta Age* advised that whites “are afraid to lynch us where they know the black man is standing behind the door with a Winchester.”<sup>143</sup>

The importance of armed self-defense was not lost on young Walter White, later the famous spokesman for the NAACP. During the Atlanta riots, with a mob encroaching, thirteen-year-old Walter waited with his father, gun in hand, at the front windows of their home on Huston Street.<sup>144</sup> Someone in the crowd shouted, “That’s where that nigger mail carrier lives. Let’s burn it down! It’s too nice for a nigger to live in.”<sup>145</sup> White’s father calmed him, “Son, don’t shoot until the first man puts his foot on the lawn and then—don’t you miss!”<sup>146</sup> Shots from a nearby building dispersed the crowd before White had to fire, but the episode was seared in his memory and cemented his Negro identity.<sup>147</sup>

During the bleak days of the lynch era, “[p]ractically all outspoken Afro-American leaders . . . advocated self-defense on some level.”<sup>148</sup> Prominent Black editor Thomas Fortune explained, “‘We do not counsel a breach of the law, but in the absence of law . . . we maintain that the individual has every right . . . to protect himself. . . . We do not counsel violence, . . . we counsel manly retaliation.’”<sup>149</sup>

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<sup>140</sup> SHAPIRO, *supra* note 26, at 77.

<sup>141</sup> See *id.* (stating that Carson’s remarks were clearly not “taken lightly” since the *Washington Post* expressed its “alarm and surprise” in an editorial).

<sup>142</sup> *Id.* at 78.

<sup>143</sup> TIMOTHY B. TYSON, RADIO FREE DIXIE: ROBERT F. WILLIAMS AND THE ROOTS OF BLACK POWER 211 (1999) (quoting “*Bad Nigger with a Winchester*”: *Colored Editors Declare for Armed Resistance to Lynch Law*, WASH. POST, Aug. 7, 1901, at 4).

<sup>144</sup> See WALTER WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE 10–12 (1948) (describing White’s childhood experience with a mob that was threatening the family home).

<sup>145</sup> *Id.* at 11 (internal quotation marks omitted).

<sup>146</sup> *Id.* (internal quotation marks omitted).

<sup>147</sup> *Id.* at 12.

<sup>148</sup> CHRISTOPHER B. STRAIN, PURE FIRE: SELF-DEFENSE AS ACTIVISM IN THE CIVIL RIGHTS ERA 20 (2005).

<sup>149</sup> Emma Lou Thornbrough, *T. Thomas Fortune: Militant Editor in the Age of Accommodation*, in BLACK LEADERS OF THE TWENTIETH CENTURY 19, 22–23 (John Hope Franklin & August Meier eds., 1982).

Observing that “lynchings had been prevented by armed self-defense in Jacksonville, Florida and Paducah, Kentucky,”<sup>150</sup> Ida B. Wells Barnett famously advised, “The lesson this teaches and which every Afro-American should ponder well, is that a Winchester rifle should have a place of honor in every Black home.”<sup>151</sup> Wells said, “[I]t should be used for that protection which the law refuses to give.”<sup>152</sup> This was no mere flash of rhetoric. Wells was personally armed at least as early as 1892 when she “bought a pistol the first thing after Tom Moss was lynched.”<sup>153</sup>

W.E.B. Du Bois’s views can be discerned from his work as editor of the *Crisis*.<sup>154</sup> But his actions in response to the 1906 Atlanta riot are also telling. The riot occurred while Du Bois was away in Alabama.<sup>155</sup> Although Du Bois knew that many people owned and carried pistols, he had never purchased or carried one.<sup>156</sup> After the riot, Du Bois revealed, “I bought a Winchester double-barreled shotgun and two dozen rounds of shells filled with buckshot. If a white mob had stepped on the campus where I lived I would without hesitation have sprayed their guts over the grass.”<sup>157</sup>

There were no illusions that armed self-defense offered any sort of guarantee. This is evident in Tuskegee Institute President Robert Moton’s 1919 letter to President Woodrow Wilson lamenting the “account of the lynching in Georgia, of an old coloured man seventy years of age who shot one of two intoxicated white men in his attempt to protect two coloured girls, who had been commanded to come out of their home in the night by these two men.”<sup>158</sup>

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<sup>150</sup> LINDA O. MCMURRY, *TO KEEP THE WATERS TROUBLED: THE LIFE OF IDA B. WELLS* 164 (1998).

<sup>151</sup> *Id.*

<sup>152</sup> IDA B. WELLS, *SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892–1900*, at 70 (Jacqueline Jones Royster ed., 1997).

<sup>153</sup> IDA B. WELLS, *CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS* 62 (Alfreda M. Duster ed., 1970); *see also id.* at 63 (indicating that Wells purchased a weapon after her friends were lynched in March of 1892).

<sup>154</sup> *See, e.g., infra* text accompanying notes 288–91 (discussing Du Bois’s writings on self-defense).

<sup>155</sup> Du Bois was in rural Alabama conducting a study of Lowndes County sharecropping when the Atlanta riot broke out. LEWIS, *supra* note 31, at 354.

<sup>156</sup> W.E.B. DU BOIS: *AN ENCYCLOPEDIA* 19 (Gerald Horne & Mary Young eds., 2001).

<sup>157</sup> LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 317 (1998); *see* STRAIN, *supra* note 148, at 24 (“DuBois rushed home to guard his house and protect his family: he did so by keeping watch on the porch with a rifle across his lap.”). This episode is recounted slightly differently in three different sources. Strain gives the impression that Du Bois was defending his home while the riot was in session. But other sources show that DuBois acquired the gun and ammunition on his return, after the riots. *See* LEWIS, *supra* note 31, at 354 (stating that Du Bois was in Alabama at the time of the Atlanta riot).

<sup>158</sup> STEPHEN GRAHAM, *CHILDREN OF THE SLAVES* 263–64 (1920) (quoting Letter from Robert Morton to Woodrow Wilson (Aug. 1919)); *About Us*, TUSKEGEE UNIV., [http://www.tuskegee.edu/about\\_us/legacy\\_of\\_leadership/robert\\_r\\_moton.aspx](http://www.tuskegee.edu/about_us/legacy_of_leadership/robert_r_moton.aspx) (last visited Apr. 17, 2013).

Some of the earliest efforts of the NAACP were in support of individuals prosecuted for acts of armed self-defense.

The NAACP undertook its first major legal case in 1910 by defending Pink Franklin, a Black South Carolina sharecropper accused of murder. When Franklin left his employer after receiving an advance on his wages, a warrant was sworn out for his arrest under an invalid state law. Armed policemen arrived at Franklin's cabin before dawn to serve the warrant without stating their purpose and a gun battle ensued, killing one officer. Franklin was convicted of the murder and sentenced to death. The NAACP appealed to South Carolina Governor Martin F. Ansel, and Franklin's sentence was commuted to life in prison. Eventually, he was set free in 1919.<sup>159</sup>

In 1919, the NAACP defended Sergeant Edgar C. Caldwell, who was prosecuted for killing a street car conductor in Anniston, Alabama.<sup>160</sup> Following a dispute, Caldwell was kicked from the car. As he was getting up, the conductor and the motorman advanced with weapons in their hands. Caldwell drew his revolver and killed the conductor and wounded the motorman. Leaders of the Anniston Branch of the NAACP, supported by the national office and an array of lawyers, defended Caldwell, but ultimately to no avail. He was executed on July 30, 1920.<sup>161</sup> An editorial in the *Crisis* concluded, "No person who is conversant with the facts in his case feels that [Caldwell] was guilty of a crime when he fought to save his own life. No red-blooded person would have done otherwise. Caldwell has been sacrificed on the altar of prejudice."<sup>162</sup>

The NAACP's biggest case in the 1920's was the defense of Dr. Ossian Sweet, and several family members.<sup>163</sup> They were charged with murder for killing a member of a mob that attacked their home in a white suburb of Detroit. Shortly after the Sweets moved in the mob gathered.

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<sup>159</sup> LIBRARY OF CONGRESS, *NAACP: A Century in the Fight for Freedom 1909–2009, the Pink Franklin Case*, <http://myloc.gov/exhibitions/naacp/earlyyears/exhibitobjects/thepinkfranklincase.aspx> (last visited Mar. 7, 2013). Another example where the NAACP sought to protect individuals prosecuted when acting in self defense involved the case of Steve Greene, a tenant farmer in Arkansas who dared to seek out a better arrangement with another landowner. His jilted employer accosted Greene at his new tenancy and shot him several times. Greene retrieved a gun and killed his attacker and then fled to Chicago. He fought extradition with the help of Ida Wells-Barnett and later fled to Canada. GOINGS, *supra* note 32, at 12.

<sup>160</sup> *Sergeant Caldwell Executed*, CRISIS, Oct. 1920, at 282.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> See WILSON RECORD, RACE AND RADICALISM: THE NAACP AND THE COMMUNIST PARTY IN CONFLICT 47 (1964) (identifying the Sweet case as "[p]erhaps the most important case" of NAACP appellate challenges for gross injustice in the 1920s).

On two successive nights the mob rocked the house and broke out windows. On the second night shots were fired.<sup>164</sup> The Sweets fired into the crowd, killing a white man.<sup>165</sup> All twelve people in the house were charged with murder.<sup>166</sup> The NAACP raised over seventy thousand dollars to support the case<sup>167</sup> and hired Clarence Darrow and Arthur Garfield Hays to defend the Sweets.<sup>168</sup> The Sweets were tried twice and ultimately found not guilty.<sup>169</sup>

The *New York Amsterdam News* gave “all out support to upholding the right of self-defense,”<sup>170</sup> and called the Sweet case the “most important court case the Negro has ever figured in in all the history of the United States.”<sup>171</sup> Editorials urged that the willingness of the Sweet family to defend its home represented the spirit “the Negro must more and more evidence if he is to survive.”<sup>172</sup>

Hubert H. Harrison’s public declaration in 1921 is equally explicit.<sup>173</sup> “I advise you to be ready to defend yourselves. I notice that the State Government has removed some of its restrictions upon owning firearms, and one form of live insurance for your wives and children might be the possession of some of these handy implements.”<sup>174</sup>

During the same period, Tuskegee Institute President, Dr. Robert Moton, successor to the conservative legacy of Booker T. Washington, took up arms when Tuskegee was menaced by the Klan.<sup>175</sup> After the Federal government decided to build a Negro veterans hospital on land donated by Tuskegee, local whites and the KKK sought control of the

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* (noting that the entire family was arrested and charged with murder).

<sup>167</sup> KEVIN BOYLE, *ARC OF JUSTICE: A SAGA OF RACE, CIVIL RIGHTS, AND MURDER IN THE JAZZ AGE* 307 (2004); *see also* RECORD, *supra* note 163, at 45 (claiming the NAACP spent \$37,000). Furthermore, “[t]he mayor and the district attorney’s office blamed the Sweets and their friends for inciting the mob.” Leonard S. Rubinowitz & Imani Perry, *Crimes Without Punishment: White Neighbors’ Resistance to Black Entry*, 92 J. CRIM. L. & CRIMINOLOGY 335, 391 (2002) (book review). Police lied to the prosecutors that there was no mob and that no stones were thrown nor shots fired at the house. *Id.* “Clarence Darrow, who represented the defendants, demonstrated that prosecution witnesses were coached to perjure themselves, and he got some witnesses to admit what really happened that night.” *Id.*

<sup>168</sup> BOYLE, *supra* note 167, at 307.

<sup>169</sup> RECORD, *supra* note 163, at 48.

<sup>170</sup> SHAPIRO, *supra* note 26, at 188.

<sup>171</sup> Editorial, *We Must Fight if We Would Survive*, N.Y. AMSTERDAM NEWS, Nov. 18, 1925, at 1.

<sup>172</sup> *Id.*

<sup>173</sup> A. Philip Randolph called Harrison “the father of Harlem radicalism” and historian Joel A. Rogers “considered him the foremost Afro-American intellect of his time and one of America’s greatest minds.” COLUMBIA UNIV. LIBR., *Introduction to Hubert H. Harrison Papers, 1893–1927*, 2 (2007), [http://www.columbia.edu/cu/libraries/inside/projects/findingaids/scans/pdfs/Harrison\\_Hubert\\_H.pdf](http://www.columbia.edu/cu/libraries/inside/projects/findingaids/scans/pdfs/Harrison_Hubert_H.pdf) (internal quotation marks omitted).

<sup>174</sup> SHAPIRO, *supra* note 26, at 159 (citation omitted).

<sup>175</sup> WHITE, *supra* note 144, at 69–70.



enterprise and its jobs.<sup>176</sup> When Blacks objected, the Klan paraded through Tuskegee and then held a rally on the grounds.<sup>177</sup> Walter White's brother, George, passing for white, gained access to the event and learned of plans to kill Moton and torch the campus in order to force surrender of control over the hospital.<sup>178</sup> As the conflict boiled, Walter White traveled to Tuskegee and found an extraordinary change in Dr. Moton.<sup>179</sup>

He was gentle man who hated conflict and violence. Although he had incurred sharp criticism and even bitter resentment for doing so, he had urged upon Negro soldiers in France that they win the war first and then rely on gratitude from their government for the abolition of injustices and indignities. But the brazen attitude of the Ku Klux Klan and the . . . threats to destroy Tuskegee Institute marked a turning point in Dr. Moton's philosophy. I sat with him in his home at Tuskegee during the height of the trouble. He pointed to a rifle and a shotgun, well oiled and grimly businesslike, that stood in the corner of the room. Although his words in cold print may sound overheroic, they did not sound so to me as he said quietly, "I've got only one time to die. If I must die now to save Tuskegee Institute, I'm ready. I've been running long enough."<sup>180</sup>

In the 1930s, Northern organizers supporting the Sharecropper's Union in Alabama<sup>181</sup> found that the armed sharecropper was the norm. At a meeting in Dadeville, Alabama, organizer Harry Haywood witnessed "a small arsenal. . . . There were guns . . . of all kinds—shotguns, rifles and pistols."<sup>182</sup>

In 1939, John Lovell, Jr., Secretary of the Washington D.C. branch of the NAACP commented on the efforts of a "militant Howard Professor" who had moved into a restricted Washington D.C. neighborhood.

He was told to get out and get out fast. When he failed to comprehend the warning, his new home was given a battering. Others reported the matter to the police; the professor merely took the pains to build a barricado that even the Japanese would respect. . . . One [of his friends] got his guns together and installed himself in the barricado. The

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<sup>176</sup> *Id.* at 69.

<sup>177</sup> *Id.* at 70.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> ROBIN D. G. KELLEY, HAMMER AND HOE: ALABAMA COMMUNISTS DURING THE GREAT DEPRESSION 45 (1990).

<sup>182</sup> *Id.* (internal quotation marks omitted).

two, fortified further by sandwiches and milk, quietly sat, watched and waited. [Others] sent word . . . that when help was needed, help would come. Evidently they got [the message] over to the enemy, for absolutely nothing happened after that.<sup>183</sup>

Later in the struggle, Dr. T.R.M. Howard emerged as an unapologetic advocate of armed self-defense. His education paid for by a white sponsor, Howard returned to the South in the early 1940s. "From the beginning, armed self-defense was an important component of Howard's civil rights strategy. In this respect, he followed in a long tradition that later found expression under the leadership of Robert Williams . . . and various civil rights activists in the Deep South."<sup>184</sup> When Howard was denied a permit to carry a concealed weapon under the racist administration of Mississippi's discretionary permit system, he exploited the allowance for unconcealed weapons and kept a long gun in a rack in his car.<sup>185</sup> also claimed to have a secret compartment built into his car to hide his handgun.<sup>186</sup>

In a long career of activism, Howard is most noted for his efforts surrounding the investigation of the Emmett Till murder. Howard helped search for witnesses, develop evidence and opened his home as a safe haven for journalists, witnesses and visitors during the trial.<sup>187</sup>

Firearms were ubiquitous, including a pistol strapped to Howard's waist. When Cloyte Murdock of *Ebony* had difficulty getting her luggage through the front door, she looked around the corner and saw a cache of weapons on the other side. Another visitor spied a magnum pistol and .45 at the head of Howard's bed, a Thompson submachine gun at the foot and "a long gun, a shotgun or rifle, in every corner of every room." Each day, Howard escorted [Maime] Bradley [Till's mother] and [Representative Charles] Diggs [of Michigan] . . . to . . . the trial . . . in an armed car caravan.<sup>188</sup>

Some contend that the acquittal of the men charged with Till's murder marked "the beginning of the Civil Rights Movement in Mississippi."<sup>189</sup>

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<sup>183</sup> John Lovell, Jr., *Washington Fights*, CRISIS, Sept. 1939, at 276.

<sup>184</sup> David T. Beito & Linda Royster Beito, *Blacks, Gun Cultures, and Gun Control: T.R.M. Howard, Armed Self-Defense and the Struggle for Civil Rights in Mississippi*, 17 J. FIREARMS & PUB. POL. 133, 133–34 (2005).

<sup>185</sup> *Id.* at 136.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 139.

<sup>188</sup> *Id.*

<sup>189</sup> BEITO & BEITO, *supra* note 25, at 130.

Howard was propelled onto the national stage.<sup>190</sup> In speeches and commentary, Howard presented armed self-defense as an essential private resource. On several public occasions Howard recounted the story of his friend George L. Jefferson, head of the Vicksburg NAACP. The Klan had burned a cross in front of Jefferson's funeral home. According to Howard, Jefferson called to alert the Sheriff that some of the logistics of Jim Crow required tending:

[T]hey have burned a cross in front of my funeral home. I'm sure that you and everybody in Vicksburg knows where my wife and my family lives. I understand that they are going out there to burn a cross. And, Mr. Sheriff, I just want to tell you that Mississippi laws requires [sic] separate ambulances for transportation of colored and white persons and inasmuch as the white hearse can't carry a colored man or a colored hearse can't carry a white man, I'm telling you that when that group comes out my home to burn a cross, I have already got my colored ambulance standing by. I want you to send a white hearse along because somebody's going to be hauled away.<sup>191</sup>

The punch line, rendered "[t]o loud applause" by Black audiences, was that no cross was burned at Jefferson's home.<sup>192</sup> The white establishment was less enthused. *The Jackson Daily News* reprinted the full text of Howard's speech, and in three separate editorials condemned his "incendiary" language and his "[p]oison [t]ongue."<sup>193</sup>

In other contexts, members of the leadership benefitted from the self-defense preparations of the rank and file who had organized to protect their communities. Describing her work with Thurgood Marshall to integrate the University of Alabama, Judge Constance Baker Motley recalls:

When Autherine Lucy registered in February 1956 and was finally on campus, a riot broke out . . . . We then went to court with a motion to hold the dean of admissions and members of the board of trustees in contempt for failing to secure Miss Lucy's peaceful attendance. . . . While in Birmingham for this hearing, we stayed in Arthur Shores's spacious new home on the city's outskirts. This house had been bombed on several occasions, but because we could not stay in a hotel or motel in Birmingham, we had to take up

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<sup>190</sup> *Id.* at 129 ("The Till case propelled Howard into the national black media and civil-rights spotlight as never before.").

<sup>191</sup> *Id.* at 136.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Shores's offer of his bomb-prone abode . . . .

When Thurgood and I arrived, the garage door was wide open. Inside were six or eight Black men with shotguns and machine guns who had been guarding the house since the last bombing. . . . When we went to court the next day, the driver of our car and one other man in the front passenger seat carried guns in their pockets.<sup>194</sup>

Judge Motley's experience was no aberration. After Autherine Lucy was pelted with eggs and gravel as she walked the gauntlet trying to attend her first class, she retreated to a salon in the Black part of town where beauticians washed her hair and cleaned her clothes.<sup>195</sup> As a white mob gathered outside, the owner of the shop, Nathaniel Howard, Sr., called for help and a group of Black men armed with rifles and shotguns quickly arrived.<sup>196</sup> This show of force dispersed the crowd. The Black men then gave Lucy an armed escort to Birmingham.<sup>197</sup>

In Birmingham, Reverend Fred Shuttlesworth, a leader of the freedom movement there, enjoyed armed protection of the "Civil Rights Guards" after being threatened and attacked by white racists.<sup>198</sup> After the 1963 bombing of the Sixteenth Street Baptist Church in Birmingham killed four little girls, residents of the community of black strivers known as "Dynamite Hill" set up a community guard system where "[a]rmed blacks regularly patrolled their neighborhood."<sup>199</sup> Birmingham native, former Secretary of State, and Second Amendment absolutist Condoleezza Rice recalls the night in 1963 when a bomb was hurled through the window of a house down the block from her home. Her family fled temporarily to the home of friends in a neighboring town.<sup>200</sup> When they returned home late that night,

Daddy [Reverend Rice] didn't say anything more about the

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<sup>194</sup> CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 122–23 (1998).

<sup>195</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 44.

<sup>196</sup> *Id.*

<sup>197</sup> E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* 78 (1993).

<sup>198</sup> ANDREW M. MANIS, *A FIRE YOU CAN'T PUT OUT: THE CIVIL RIGHTS LIFE OF BIRMINGHAM'S REVEREND FRED SHUTTLESWORTH* 118 (1999). For instances of attacks by white supremacists on Rev. Shuttlesworth and his family, see *id.* at 110, 117, 169–70.

<sup>199</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 39; see also GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* 322 (1997) ("Terrorized black families living on Dynamite Hill had formed an extralegal security force to protect themselves."); RICE, *supra* note 124, at 92 (explaining how the Birmingham neighborhood of prominent civil rights leader Arthur Shores became known as "Dynamite Hill"); George Lavan, *Armed Birmingham Negroes Conduct Own Safety Patrols*, *MILITANT*, Sept. 23, 1963 at 1, 5 ("Negroes in Birmingham have armed themselves and are patrolling their neighborhoods.").

<sup>200</sup> RICE, *supra* note 124, at 92.

bomb. He just went outside and sat on the porch in the springtime heat with his gun on his lap. He sat there all night looking for white night riders. Eventually daddy and the men of the neighborhood formed a watch. They would take shifts at the head of the two entrances to our streets. There was a formal schedule, and Daddy would move among them to pray with them and keep their spirits up. Occasionally they would fire a gun into the air to scare off intruders, but they never actually shot anyone.<sup>201</sup>

A similar defense squad was formed by war veterans in Tuscaloosa, Alabama. The Tuscaloosa defense squad protected the homes of movement activists, rescued teenage demonstrators from a mob, and repelled a Klan attack.<sup>202</sup>

While the Deacons for Defense and Justice<sup>203</sup> are the most widely known, movement leaders in a variety of other places benefitted from the organization and activities of armed defense groups. In Natchez, Mississippi, armed men of the community guarded local NAACP leader George Metcalf.<sup>204</sup> In Meridian, Mississippi, a defense group guarded the home of NAACP leader Claude Bryant.<sup>205</sup> In Hattiesburg, Mississippi, armed community men led by army veteran James Nix guarded the homes of local black leaders Dr. C. E. Smith and J. C. Fairly.<sup>206</sup> In Cambridge, Maryland, several seasons of black protest fueled a backlash in 1963 when white mobs roved through the city's black neighborhoods. Black residents responded with gunfire and a defense guard formed to protect the home of local leader Gloria Richardson.<sup>207</sup> Also in 1963, Korean War Veteran and NAACP activist Robert Hayling organized a defense squad in St. Augustine, Florida. Hayling's voter registration efforts and protests of

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<sup>201</sup> *Id.* at 93. The experience, says Rice, affected her policy perspective to this day. "Because of this experience, I'm a fierce defender of the Second Amendment and the right to bear arms. Had my father and his neighbors registered their weapons, Bull Connor surely would have confiscated them or worse." *Id.*; see also Interview by Larry King with Condoleezza Rice, Sec'y of State, in Washington D.C. (May 11, 2005), available at <http://transcripts.cnn.com/TRANSCRIPTS/0505/11/lkl.01.html> (discussing her concern about the abridgement of the Second Amendment because of her personal experience in Birmingham, Alabama when her father and his friends defended her community with arms during the Civil Rights movement).

<sup>202</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 43.

<sup>203</sup> For example, the story of the Deacons was made into a film starring Forest Whitaker. DEACONS FOR DEFENSE (Showtime 2003). See generally HILL, *supra* note 121 (examining the history of the Deacons for Defense and Justice); Cottrol & Diamond, *The Second Amendment*, *supra* note 134, at 357-58.

<sup>204</sup> EVERS & SZANTON, *supra* note 86, at 185; Akinyele O. Umoja, "We Will Shoot Back": *The Natchez Model and Paramilitary Organization in the Mississippi Freedom Movement*, 32 J. BLACK STUDIES 271, 276-77 (2002).

<sup>205</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 119.

<sup>206</sup> *Id.* at 128.

<sup>207</sup> *Id.* at 188-89.

continuing segregation prompted shotgun attacks on his home. He responded by buying a cache of rifles and shotguns and organizing a group to guard his home and the surrounding neighborhood.<sup>208</sup> In October 1963 when a carload of Klansmen assaulted local activist Goldie Eubanks, the defense squad repelled the attack and killed one white man.<sup>209</sup>

But this is not primarily a story of organized defense groups. Movement leaders, as well as the rank and file, prepared for the fact that often they would be solely responsible for their own safety. In South Carolina, a solitary Reverend J. A. Delaine fired back with effect when white terrorists shot up his home.<sup>210</sup> The home of local activist Amzie Moore of Cleveland, Mississippi, who mentored younger activists who would rise to form the Student Nonviolent Coordinating Committee (“SNCC”), was well-stocked with arms and ammunition. Not only was his home well-fortified, “like most politically active Blacks in the Delta,” Moore carried a gun when he traveled.<sup>211</sup> A young white activist spending the night at Moore’s home was startled when Moore placed a pistol on the night table and suggested that he and his friends use it “in case of emergency.”<sup>212</sup>

E.W. Steptoe, chairman of the Amite County NAACP “never went out of the door unarmed”<sup>213</sup> recalls one SNCC worker. Another recalled: “Steptoe was always so wonderfully well armed. . . . It was just marvelous. . . . You’d go to Steptoe’s and as you went to bed he would open up the night table [and] there would be a large .45 automatic sitting next to you. Just guns all over the house, under pillows, under chairs.”<sup>214</sup>

Rosa Parks verified the tradition of defensive firearms ownership she first observed as a child:

By the time I was six, I was old enough to realize that we were not actually free. The Ku Klux Klan was riding through the Black community, burning churches, beating up people, killing people. . . . [M]y grandfather kept his gun—a doubled barreled shotgun—close by at all times. . . . I

<sup>208</sup> *Id.* at 187–88.

<sup>209</sup> DAVID R. COLBURN, *RACIAL CHANGE AND COMMUNITY CRISIS: ST. AUGUSTINE FLORIDA, 1877–1980*, at 54 (1985); DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 316–17 (1986); Edward W. Kallal, Jr., *St. Augustine and the Ku Klux Klan: 1963 and 1964*, in *ST. AUGUSTINE, FLORIDA, 1963–1964: MASS PROTEST AND RACIAL VIOLENCE* 93, 101 (David J. Garrow ed., 1989).

<sup>210</sup> RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 3 (1976).

<sup>211</sup> CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* 44 (1995).

<sup>212</sup> TRACY SUGARMAN, *STRANGER AT THE GATES: A SUMMER IN MISSISSIPPI* 75 (1966).

<sup>213</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 109.

<sup>214</sup> *Id.* (alterations in original).

remember thinking that whatever happened, I wanted to see it. I wanted to see him shoot that gun.<sup>215</sup>

Her adult experience confirms that the tradition remained vibrant. When Parks and her husband began organizing activist meetings at their home the participants were unfailingly armed. Parks recalled: “This was the first time I’d seen so few men with so many guns.”<sup>216</sup> After one meeting where Parks had not thought to offer food, she realized: “[W]ith the table so covered with guns, I don’t know where I would have put any refreshments.”<sup>217</sup>

When the Freedom Summer project brought white volunteers to Mississippi, “local activists used their guns to defend themselves, their communities, and the volunteers they housed.”<sup>218</sup> In some areas “a majority of African-Americans . . . protected their property with guns. Volunteers were required to honk a prearranged signal before approaching Black farms. If they failed to do so, Black guards were likely to fire at their car.”<sup>219</sup> Consistent with the experience of northern labor organizers thirty years earlier, SNCC workers in the modern movement found Black sharecroppers in Alabama to be armed and unapologetic advocates of self-defense.<sup>220</sup>

Although some civil rights scholars have characterized the substantially male character of Black self-defense during the era as a “gendered symbol of defiance,”<sup>221</sup> Black women readily used guns to defend themselves and others during the freedom struggle. During the Freedom Summer project, one student volunteer was shocked to find that her host, “Mrs. Fairly was armed to the teeth”. In a letter home the student wrote, “I met Mrs. Fairly coming down the hall from the front porch carrying a rifle in one hand [and] a pistol in the other.”<sup>222</sup> In 1965, in Bogalusa, Louisiana, the wife of local activist Robert Hicks used her pistol

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<sup>215</sup> ROSA PARKS WITH JIM HASKINS, *ROSA PARKS: MY STORY* 30–31 (1992).

<sup>216</sup> *Id.* at 67.

<sup>217</sup> *Id.*

<sup>218</sup> Simon Wendt, *Protection or Path Toward Revolution?: Black Power and Self-Defense*, 9 *SOULS* 320, 323 (2007) [hereinafter Wendt, *Protection or Path*].

<sup>219</sup> *Id.*

<sup>220</sup> See KELLEY, *supra* note 181, at 229 (“[E]xactly thirty years after the bloody cotton pickers’ strike of 1935. . . . [S]tudent activists [were] somewhat startled when poor farmers . . . came to meetings enthusiastic and fully armed.”); see also CLAYBORN CARSON, *IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960’S*, at 164 (describing experiences of a SNCC worker who helped “unit[e] a group of militant and self-reliant” Black farmers).

<sup>221</sup> Wendt, *Protection or Path*, *supra* note 218, at 321; see also TYSON, *supra* note 143, at 141 (observing that Robert Williams “denounced the ‘emasculated men’ who preached non-violence while white mobs beat their wives and daughters” and stated “[w]hen we passively submit to these barbaric injustices . . . we most surely can be called the ‘sissy race’ of all mankind”).

<sup>222</sup> DOUG MCADAM, *FREEDOM SUMMER* 90 (1988) (alteration in original).

to fend off Klansmen who had followed a CORE worker to her home.<sup>223</sup> In nearby Ferriday, another woman “returned fire when a group of Klansmen shot into her home.”<sup>224</sup>

When asked how she survived so many years of racist aggression, movement stalwart Fannie Lou Hamer responded, “I’ll tell you why. I keep a shotgun in every corner of my bedroom and the first cracker even look like he wants to throw some dynamite on my porch won’t write his mama again.”<sup>225</sup> In this approach, Hamer followed the example of her mother, Lou Ella Townsend, who as a field worker at the turn of the century had been threatened and raped several times.<sup>226</sup> Unbowed, Townsend continued to challenge the culture of racism and carried a pistol hidden in a bucket while working in the cotton fields.<sup>227</sup>

In the turmoil of integrating the Little Rock school system, armed Black men guarded the home of activist Daisy Bates<sup>228</sup> and “[o]n one occasion in 1958, the NAACP leader herself repelled an invader with a volley of gunshots.”<sup>229</sup> Firearms were a familiar tool. “In 1934 Daisy and L.C. were stopped by the police in Monroe, Louisiana [and] arrested . . . on a charge of ‘investigation.’ . . . [But police] had nothing more on [L.C.] than the fact that he was carrying a pistol in his glove compartment.”<sup>230</sup> In this, L.C. Bates’ channeled both community and family tradition. “At the end of his life [Bates] said his idol had been . . . his grandfather in Mississippi, who had shot a white man who [assaulted

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<sup>223</sup> Wendt, *Protection or Path*, *supra* note 218, at 324.

<sup>224</sup> *Id.*

<sup>225</sup> Fannie Lou Hamer, *To Praise Our Bridges*, in 2 MISSISSIPPI WRITERS: REFLECTIONS OF CHILDHOOD AND YOUTH 321, 324 (Dorothy Abbott ed., 1986). Hamer was not always alone in this regard. Len Edwards recounted the days shortly after the Williams Chapel Church—adjacent to Hamer’s home—was firebombed. Following a call threatening that Hamer would be killed that night, activists took Hamer to a neighbor’s house and “got shotguns and waited for the cars to drive by.” MILLS, *supra* note 122, at 101.

<sup>226</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 121.

<sup>227</sup> *Id.*

<sup>228</sup> Wendt, *Protection or Path*, *supra* note 218, at 321–22.

<sup>229</sup> *Id.* at 322; *see also* GRIF STOCKLEY, DAISY BATES: CIVIL RIGHTS CRUSADER FROM ARKANSAS 186 (2005) (“[W]hen [Bates] and L. C., roused by the sound of a rock crashing into a window, came outside, she saw a man poised to throw again. In all, she said she fired five shots at him . . .”). Grif Stockley adds texture to the image of Bates’ shooting in self-defense:

[S]he shaped the story to fit . . . the image she wished to project. . . . [W]hen Bates spoke at churches, she became a bit more saintly. She would say in the future that she and L. C. never aimed at anyone, knowing if they shot one of their white harassers what kind of trouble she would be buying.

*Id.* at 186–87.

<sup>230</sup> STOCKLEY, *supra* note 229, at 24 (internal parentheses omitted).



two of his workers].”<sup>231</sup> Daisy Bates underscores the point in a 1959 letter to Thurgood Marshall explaining that she and L. C. were under continuing threat and “keep ‘Old Betsy’ well oiled and the guards are always on the alert.”<sup>232</sup> This would not have surprised Marshall, who found the Bates’ home “an armed camp” when he stayed there in September 1957 while litigating the Little Rock School Board’s delay of court ordered integration.<sup>233</sup>

In the early stages of his activism, Martin Luther King showed a keen appreciation for the self-defense impulse. On January 30, 1956, about two months into the Montgomery bus boycott, King’s house was bombed.<sup>234</sup> Arriving home to find his wife and daughter unharmed and probably a hundred angry, armed black men in front of the parsonage, King sent the men away.<sup>235</sup> But the next day he applied for a pistol permit at the sheriff’s office.<sup>236</sup> After his application was rejected and following a bombing of the home of Montgomery NAACP leader E.D. Nixon, members of King’s Dexter Avenue Baptist Church resolved to protect him.<sup>237</sup> “[They] brought guns and ammunition to the parsonage . . . and began guarding the house in shifts.”<sup>238</sup>

Arriving at King’s home to assist in the local struggle, Bayard Rustin recalled that the parsonage was “a virtual garrison.”<sup>239</sup> When Rustin’s friend, journalist William Worthy sat down on a pistol lying in a chair, King assured the men that the weapons were only defensive precautions.<sup>240</sup> Reverend Glenn Smiley, of the Fellowship of Reconciliation, visited Dr. King’s home in 1956 and reported back to his employer:

[King] had Gandhi in mind when this thing started . . . [He was] aware of the dangers to him inwardly, wants to do it right, but is too young and some of his close help is violent. King accepts, as an example, a body guard, and asked for a permit for them to carry guns. This was denied by the police, *but nevertheless, the place is an arsenal*. King sees the inconsistency, but not enough. He believes and yet he

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<sup>231</sup> See *id.* at 27 (“[A]t the end of his life [Bates] said his idol had been . . . his grandfather in Mississippi, who had shot a white man who was about to use a stick to hit two boys who were guarding his watermelon patch.”).

<sup>232</sup> TYSON, *supra* note 143, at 153.

<sup>233</sup> STOCKLEY, *supra* note 229, at 128, 132.

<sup>234</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 8.

<sup>235</sup> *Id.* at 8–9.

<sup>236</sup> *Id.* at 9.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> Interview with Bayard Rustin, in MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED 52, 53 (Howell Raines ed., 1977).

doesn't believe. The whole movement is armed in a sense, and this is what I must convince him to see as the greatest evil.<sup>241</sup>

King, of course, became a leading advocate of nonviolent political action.<sup>242</sup> But as we will see, he still did not consider movement nonviolence to be incompatible with private self-defense.<sup>243</sup>

Charles Evers, who succeeded his murdered brother Medgar as Field Secretary of the Mississippi NAACP,<sup>244</sup> writes candidly about members of the Mississippi movement deploying firearms in the context of imminent threats and state failure. Immediately following Medgar's murder, Aaron Henry retained an armed guard after being denied police protection.<sup>245</sup> Police then arrested the guard and confiscated his gun.<sup>246</sup> "That made the Negroes of Clarksdale so mad they gave Aaron guns enough for ten lifetimes."<sup>247</sup>

During a particularly turbulent period in 1964, Evers wrote, "I kept a gun in every corner of every room of my house. . . . I felt whites would probably get me, but not like they had Medgar—not in the back, with no return fire."<sup>248</sup> In this, Charles Evers followed the path of his father, who in 1935 provoked the wrath of Mississippi racists by violating the custom of "No niggers allowed in Decatur [Mississippi] around Christmas."<sup>249</sup> After his defiance led to an altercation with a white man, Jim Evers, his sons, Medgar and Charles, and two neighbors determined, "We better set up tonight."<sup>250</sup> With rifles deployed, they "set up a crisscross" and waited for an attack that thankfully never came.<sup>251</sup>

Charles Evers was not dissuaded by the fact that being armed was no guarantee of security. A willingness to deploy private firearms plainly had not prevented his brother from being murdered. Medgar had followed the

<sup>241</sup> ADAM FAIRCLOUGH, *TO REDEEM THE SOUL OF AMERICA: THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE AND MARTIN LUTHER KING, JR.* 24–25 (1987) (emphasis added); Stewart Burns, Overview: *The Proving Ground*, in *DAY BREAK OF FREEDOM: THE MONTGOMERY BUS BOYCOTT* 22–23 (Stewart Burns ed., 1997).

<sup>242</sup> See *infra* Part II.B. (discussing King's argument that political goals were best achieved by non-violence).

<sup>243</sup> See *infra* Part II.B. (explaining how Martin Luther King viewed violence in self-defense as distinct from nonviolence for political goals).

<sup>244</sup> EVERS & SZANTON, *supra* note 86, at 147.

<sup>245</sup> *Id.* at 137.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 171.

<sup>249</sup> *Id.* at 16; see also JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* 1 (1995) (recounting a story of Charles and Medgar Evans being turned away by a crowd of whites at a polling place and then returning with their guns).

<sup>250</sup> EVERS & SZANTON, *supra* note 86, at 17.

<sup>251</sup> *Id.*

practice of his mentor and employer, Dr. T.R.M. Howard. Ruby Hurley, NAACP Youth Program Director recalls, “[m]any times when Medgar and I would be driving together, Medgar would tell about carrying his gun. . . . He used to sit on it, under his pillow.”<sup>252</sup> Medgar’s wife, Myrlie, later recounted, that the family “had guns in every room of our house. I slept with a small revolver next to me on the nightstand. He slept with a rifle next to him. We had one in the hall, we had one in the front room.”<sup>253</sup> Medgar’s murder shows that having a gun is no guarantee of safety and some will argue only introduces new dangers in the sense that Black self-defenders who survived attacks often were left to deal with racist local authorities.<sup>254</sup> But none of this diminished the Evers’ resolve to arm themselves for self-defense.<sup>255</sup>

These and many other episodes show a practical and intimate appreciation within the black community for the principle and practice of armed self-defense. So it should be no surprise that, as a matter of policy and philosophy, blacks from the leadership to the grassroots insisted upon the legitimacy of private self-defense by distinguishing it from political violence, and defended this distinction even at the risk that it would impede the freedom movement. The next section details that effort.

#### B. *The Strategic Dichotomy: The Black Community Upholds Firearms Ownership and Armed Self-Defense as Policy*

Coalition politics and alliances with white progressives have played a major role in the black freedom struggle.<sup>256</sup> This has posed a dilemma. Blacks have rightly worried that vital coalitions would unravel if the

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<sup>252</sup> Raines, *supra* note 240, at 271.

<sup>253</sup> HENRY HAMPTON ET AL., VOICES OF FREEDOM: AN ORAL HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM THE 1950S THROUGH THE 1980S, at 152 (1990); *see also* Interview by Orlando Bagwell with Myrlie Evers (Nov. 27, 1985), available at <http://digital.wustl.edu/e/eop/eopweb/eve0015.0753.036myrlieevers.html>.

<sup>254</sup> *See, e.g.*, WENDT, SELF-DEFENSE, *supra* note 121, at 191 (relating story of a Black activist, who pursued the perpetrators of a shotgun attack on a civil rights meeting, then being arrested by police for carrying a concealed weapon, even though the gun was sitting in the open on the front seat, in compliance with Mississippi law).

<sup>255</sup> *See* EVERS & SZANTON, *supra* note 86, at 64, 154 (describing an incident where the Evers brothers brandished guns in public, and Charles Evers later having “guns everywhere”). Compare the modern response of NRA Board Member, Roy Innis (who lost a son to gun violence) to Pete Shields founder of Handgun Control, Inc., (who lost a son to gun violence). Compare *Nelson T. Shields Dies; Gun Control Advocate*, WASH. POST, Jan. 26, 1993, at D8, with *Mr. Roy Innis*, NRA BD. OF DIRS., <http://nra.org/board/#INNIS> (last visited Mar. 5, 2013). Innis followed the Charles Evers approach. Shields and many others in the modern era have put their energy into gun control. *Nelson T. Shields Dies; Gun Control Advocate*, *supra*.

<sup>256</sup> *See* DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970, at 4, 40 (1982) (advocating the political process model of social movement theory as explanation for the insurgency of blacks in America, and noting “the political alignment of groups within the larger political environment” to be crucial in the generation of that social insurgency).

struggle became overtly violent.<sup>257</sup> On the other hand, real world threats and state failure have made armed self-defense an essential private resource.<sup>258</sup> In response to this dilemma, the black community developed and maintained a *strategic dichotomy* between private self-defense and collective political violence.

Instinctively, we understand that minorities are unlikely to achieve group political goals through violence. Absent some sort of technological or tactical advantage,<sup>259</sup> collective violence is a dubious strategy for people who are outnumbered. Private self-defense, however, is another matter. It fits easily within the long tradition of self-help in the private realm that is not supplanted by group agendas.<sup>260</sup>

On the other hand, the leadership has rightly worried that vital coalitions would unravel if the struggle became overtly violent or devolved into insurrection. In response to this dilemma, blacks developed—and until relatively recently maintained—a crucial distinction between private self-defense and collective political violence. The development and defense of that strategic dichotomy and its conflict with the modern orthodoxy are the focus of this section.

The strategic dichotomy is evident early on in the words and deeds of Henry Highland Garnet, a free black and Presbyterian minister in Troy, New York.<sup>261</sup> His 1843 “Address to the Slaves of the United States,” at the National Colored Convention in Buffalo, was a call for open revolt.<sup>262</sup> Reports of the speech angered southerners, strained abolitionist alliances, and divided the delegates of the Convention.<sup>263</sup> Many delegates feared retaliation when they returned home and considered Garnet’s advocacy of political violence entirely counterproductive.<sup>264</sup> On the other hand, without

<sup>257</sup> See WALDO E. MARTIN, JR., *THE MIND OF FREDERICK DOUGLASS* 57 (1984) (discussing Frederick Douglass’s initial preference of “moral and peaceful” means over “radical” measures in attempting to abolish slavery).

<sup>258</sup> STRAIN, *supra* note 148, at 9, 16 (recognizing the inconsistent application of law by courts with regard to different races’ exercise of self-defense and the sentiment of abolitionists that armed response is appropriate when forced to protect civil liberties).

<sup>259</sup> See JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* 74–80 (1997) (describing the roles advanced technology, exploitation of political divisions, and speed of communication played in permitting a small number of Europeans to conquer an empire of native South Americans).

<sup>260</sup> See EDWARD PEEKS, *THE LONG STRUGGLE FOR BLACK POWER* 15 (1971) (“Although it is spotty and uneven in certain periods of the Negro struggle, the tradition [of self-help] is nonetheless a vital element in the history of black Americans. It encompasses mutual aid, education, business ventures, employment, voting, and housing. These fields have claimed individual and group efforts of Americans of color in a long, unbroken campaign ever since before the Civil War.”).

<sup>261</sup> PEEKS, *supra* note 260, at 43.

<sup>262</sup> See *id.* at 43–44 (detailing Garnet’s call for “every slave throughout the land” to “arise” and resist their “lordly enslavers”).

<sup>263</sup> *Id.* at 44.

<sup>264</sup> See *id.* at 44–45 (stating that in addition to personal retaliation, the Black delegates feared that “the nearly 400,000 free Negroes in the country” would suffer “further restrictions on what remained of

his earlier use of private violence in self-defense, Garnet's life and activism might never have blossomed. Attacked by a mob after attempting to integrate the Noyes Academy in New Hampshire, Garnet returned fire when a mobber shot into the house where he and other black students were barricaded.<sup>265</sup> This staunch the attack and allowed the students to flee. A classmate reported, "Garnet doubtless saved our lives."<sup>266</sup>

Frederick Douglass articulated the danger of using political violence to advance black interests, taking issue with those who argued that blacks should take up arms in order to secure the vote. He knew better than to dismiss the opposition as just "a few midnight assassins."<sup>267</sup> Political violence, he warned, would confront "trained armies, skilled generals of the Confederate army, and in the last resort we should have to meet the Federal army."<sup>268</sup>

Still, Douglass faced difficulty translating the entirely pacifist views of his early white allies into a message that would resonate for blacks. Douglass's early mentor and fellow abolitionist, William Lloyd Garrison, considered all violence evil and thought moral suasion and non-resistance to be the only proper tools of reform.<sup>269</sup> Douglass, however, acknowledged

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the rights and privileges" they were allowed).

<sup>265</sup> *Id.* at 45.

<sup>266</sup> *Id.*

<sup>267</sup> 4 LIFE AND WRITINGS OF FREDRICK DOUGLASS 491–523 (Philip S. Foner, ed., International 1955).

<sup>268</sup> *Id.*

<sup>269</sup> See JOHN STAUFFER, GIANTS: THE PARALLEL LIVES OF FREDERICK DOUGLASS & ABRAHAM LINCOLN 78 (2008) (discussing the Garrison-edited *Liberator* and its advocacy of nonviolence and moral suasion as influential to Douglass).

While Douglass sought and depended on white alliances, fitting him into this model is complicated by the fact that his views changed over time. Douglass developed under Garrison, whose evangelical abolitionism demanded nonviolence and even nonvoting. See *id.* at 144 (describing the frustration of Black abolitionists with Garrison's "insistence" on these two practices). By the 1850s, Douglass had moved to a more radical abolitionism. "Douglass and Radical Abolitionists . . . defined slavery as a state of war. This meant that Congress and the president were obliged to free the slaves right now . . . But since they did nothing, it was the 'highest obligation' of the people of the free states to make war on slavery in order to preserve the peace and save the Union." *Id.* at 156. This was certainly more extreme than Garrison's pacifism, but still different from black political violence under the strategic dichotomy in that it anticipated a national conflict whose combatants were primarily white.

To a limited extent, however, Douglass did seem to advocate black political violence. Following the *Dred Scott* decision, Douglass engaged with John Brown in planning a "Subterranean Pass Way"—a more radical rendition of the Underground Railroad. *Id.* at 158. The plan was for a network of armed warriors to raid plantations and ferry fugitive slaves to Canada and thereby diminish the value of slave property in Maryland and Virginia. *Id.* at 158–59. Stephen Oates writes that Douglass was sympathetic to Brown's Subterranean Pass Way as early as 1847. See STEPHEN B. OATES, TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN 61–63 (1984) (describing a meeting between the two during which they discussed the Pass Way and "Douglass conceded that Brown's plan had much to commend it" (internal quotation marks omitted)). Douglass drew the line, however, at large-scale confrontations that would launch blacks into a doomed confrontation against white America. When John Brown supplanted the Subterranean Pass Way for an even grander plan to foment full-blown insurrection through a raid on Harpers Ferry, Douglass refused Brown's plea to join such raid,

the importance of individual self-defense in building his own early sense of self and commitment to attaining basic justice for blacks.<sup>270</sup> Douglass found it “increasingly difficult . . . to express convictions plausible to most black folks yet consistent with Garrison.”<sup>271</sup>

As blacks took up arms to resist the Fugitive Slave Act and the principles enshrined in Article IV, Section 2 of the Constitution,<sup>272</sup> Douglass became an open advocate of armed resistance to slave catchers. In a speech in 1857, Douglass celebrated recent acts of armed self-defense:

The fugitive Horace, at Mechanicsburg, Ohio, the other day, who taught the slave catchers from Kentucky that it was safer to arrest white men than to arrest him, did a most excellent service to our cause. Parker and his noble band of fifteen at Christiana, who defended themselves from kidnappers with prayers and pistols, are entitled to the honor of making the first successful resistance to the Fugitive Slave Bill. But for that resistance, and the rescue of Jerry, and Shadrack, the man-hunters would have hunted our hills and valleys, here with the same freedom with which they now hunt their own dismal swamps.<sup>273</sup>

In response to the slave hunter, Douglass recommended “[a] good revolver, a steady hand, and a determination to shoot down any man attempting to kidnap.”<sup>274</sup> Douglass’s praise of the utility of a good revolver was earnestly practical. In 1851, in Christiana, Pennsylvania,

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reasoning that an attack on the federal government “would array the whole country against us.” STAUFFER, *supra* note 269, at 160 (internal quotation marks omitted). While Brown’s strategy seemed like folly, Douglass wrote subsequently, “I am ever ready to write, speak, publish, organize, combine, and even to conspire against slavery, when there is a reasonable hope for success.” *Id.* at 165 (internal quotation marks omitted). This practical assessment reflects the kinds of decisions Blacks would continue to make within the strategic dichotomy.

<sup>270</sup> See MARTIN, JR., *supra* note 257, at 11, 13 (describing Douglass’s encounter with—and defeat of—Edward Covey, “the Negro Breaker” who had been hired to beat the insolence out of him, and his realization that “[i]t recalled to life my crushed self-respect, and my self-confidence, and inspired me with a renewed determination to be a free man” (internal quotation marks omitted)); see also Ronald T. Takaki, *Not Afraid to Die: Frederick Douglass and Violence*, in *VIOLENCE IN THE BLACK IMAGINATION: ESSAYS AND DOCUMENTS* 17, 22–23 (1993) (“Douglass’[s] act of violence liberated him psychologically. It completed his rebellion against his slavish hatred of himself and his slavish fear . . . In the process of violent struggle against the oppressor, [he] had . . . suddenly realized more deeply than ever before [a] sense of selfhood and consciousness of freedom . . .”).

<sup>271</sup> STRAIN, *supra* note 148, at 13–14. For a detailed treatment of the scholarship and divided views about Douglass’s position on violence means to abolition, see *id.* at 14.

<sup>272</sup> “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.” U.S. CONST. art. IV, § 2, cl. 3, *amended by* U.S. CONST. amend. XIII.

<sup>273</sup> Frederick Douglass, *Speech on West India Emancipation* (Aug. 4, 1857), in *TWO SPEECHES BY FREDERICK DOUGLASS* 3, 22–23 (C.P. Dewey ed., 1857).

<sup>274</sup> STRAIN, *supra* note 148, at 15.

escaped slaves and black and white abolitionists deployed revolvers, rifles, and shotguns to fight off slave catchers:

The fugitive slaves escaped. They ended up going across upstate New York. Two of them ended up in Frederick Douglass's house in Rochester, New York. Douglass drove them personally in a carriage to the wharf on Lake Erie. *And when he bid them goodbye, one of them gave him the revolver that he had used at Christiana, a memento that Douglass kept the rest of his life.*<sup>275</sup>

While Douglass saw little promise in large-scale political violence,<sup>276</sup> he did not deny the potential for self-defense or preparation for it to have group benefits, acknowledging, "[t]he practice of carrying guns . . . would be a good one for the colored people to adopt, as it would give them a sense of their own manhood."<sup>277</sup> He further stated, "Every slave-hunter who meets a bloody death in his infernal business, is an argument in favor of the manhood of our race."<sup>278</sup>

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<sup>275</sup> Transcript of David W. Blight, OPEN YALE COURSES, *The Civil War and Reconstruction Era, 1845–1877: Lecture 7—"A Hell of a Storm": The Kansas-Nebraska Act and the Birth of the Republican Party, 1854–55*, at 6 (Feb. 5, 2008), available at <http://oyc.yale.edu/transcript/548/hist-119> (emphasis added).

<sup>276</sup> Douglass resisted John Brown's appeals to join in sparking a slave revolt with a raid on the federal arsenal at Harpers Ferry. Douglass's reaction reflects a continuing skepticism about the utility of large-scale political violence:

[I]n early 1858 [Brown] spent one full month living in the attic apartment of Frederick Douglass's home in Rochester, New York. We have only one . . . letter they exchanged during that time. It says, "John, come down to dinner." . . . But what we do know, that in that attic of Frederick Douglass's house, John Brown wrote his so-called Provisional Constitution for the State of Virginia. When he took over Virginia he was going to announce a new Constitution. . . .

[Brown] desperately wanted Douglass to join him, and had he joined them Douglass would've been dead in 1859. But Douglass did have a final meeting with John Brown at an old stone quarry outside of Chambersburg, Pennsylvania, in late August of 1859. He went down from New York with a fugitive slave Douglass had helped to his freedom named Shields Green. . . . They met at this old stone quarry and in Douglass's testimony they had a long conversation. Brown tried one last time to talk Douglass into coming with him, and Douglass, in his recollection, famously said, "I can't do it. You're going to be trapped in a"—how does he put it—"you're going to be surrounded in a trap of steel. You will never get out. But if you must go, go."

Transcript of David W. Blight, OPEN YALE COURSES, *The Civil War and Reconstruction Era, 1845–1877: Lecture 9—John Brown's Holy War: Terrorist or Heroic Revolutionary?*, at 8–9 (Feb. 12, 2008), available at <http://oyc.yale.edu/transcript/550/hist-119>.

<sup>277</sup> STRAIN, *supra* note 148, at 15 (internal quotation marks omitted).

<sup>278</sup> 2 FREDERICK DOUGLASS, *Is It Right and Wise to Kill a Kidnapper?*, in *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS: PRE-CIVIL WAR DECADE, 1850–1860*, at 284, 287 (Philip S. Foner ed., 1975); *see also* Takaki, *supra* note 270, at 24 ("Violence as Douglass viewed it was a way for blacks to assert their humanity.").

The strategic dichotomy is evident in commentators' critiques of the Reconstruction Era.<sup>279</sup> Black response to racist terrorism, Herbert Shapiro argues, was shaped by three considerations: "the need to maintain links to white allies both within the South and in the national government, the right of self-defense when actually confronted with violence, and the imperative that black unity and the articulation of a common program were necessary means of rallying national support."<sup>280</sup>

The risk of upholding the strategic dichotomy was substantial. There was a real and continuing danger that private self-defense would spill over into collective political violence. This spillover is illustrated by an episode in Kansas City in 1904. An altercation between black and white school boys resulted in a crippled black boy shooting a white attacker, allegedly in self-defense.<sup>281</sup> Reports characterize the aftermath as a race riot when the private altercation escalated to include more than one hundred combatants.<sup>282</sup>

A similar spillover is illustrated in a lynching story reported by that staunch advocate of the Winchester rifle, Ida B. Wells-Barnett.<sup>283</sup> The victims' offense was to operate a grocery store in competition with white businesses.<sup>284</sup> A white competitor, joined by twelve police officers in civilian clothes, raided the Black grocery.<sup>285</sup> Under assault, the Blacks fired back, wounding three officers.<sup>286</sup> They were arrested, then taken from the Memphis jail and lynched.<sup>287</sup>

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<sup>279</sup> Compare the similar assessment about the failed alliance between blacks and white Populists in the late nineteenth century: "[A]s with most . . . interracial movements in the South, the Populists were red-shirted with the cry of 'black supremacy' by the Democrats. . . . [B]y the early 1890s white 'progressives' in the South disdained the cause of black advancement." GOINGS, *supra* note 32, at 1.

<sup>280</sup> SHAPIRO, *supra* note 26, at 19. There were notable variations on this theme. For example, A. Phillip Randolph argued, "the Negro peoples should not place their problems for solution down at the feet of their white sympathetic allies which has been and is the common fashion of the old school Negro leadership, for, in the final analysis, the salvation of the Negro, like the workers, must come from within." *Id.* at 257 (internal quotation marks omitted).

<sup>281</sup> See *High School Boy Killed*, KANSAS CITY STAR, Apr. 12, 1904 (describing the incident in which a group of white boys advanced on a group of black boys after a verbal exchange, prompting the gunshot); STRAIN, *supra* note 148, at 23.

<sup>282</sup> See *Cold Blooded Murder*, WYANDOTTE (KAN.) HERALD, Apr. 12, 1904 (documenting the "[g]reat excitement" between "a mob of armed negroes" and "a number of whites" that followed the shooting incident); STRAIN, *supra* note 148, at 23.

<sup>283</sup> See IDA B. WELLS-BARNETT, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892), reprinted in ON LYNCHINGS 1, 23 (William Loren Katz ed., 1969) ("[A] Winchester rifle should have a place of honor in every black home . . .").

<sup>284</sup> See *id.* at 18 (describing the lynching of three young African American men who "owned a flourishing grocery business in a thickly populated suburb of Memphis" across the street from a white man's corner store).

<sup>285</sup> See *id.* ("When [the white competitor] came he led a *posse* of officers, twelve in number, who afterward claimed to be hunting a man for whom they had a warrant.").

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 19.



This danger of spillover did not diminish the commitment to private firearms ownership and armed self-defense. And one wonders how much of this was overt strategic calculation and how much visceral surrender to the self-defense impulse. Witness how W.E.B. Du Bois's reactions to the terror of lynching alternate between outrage and strategic calculation: In the *Souls of Black Folk*, Du Bois argued that violence is counterproductive noting that, "[t]he death of Denmark Vesey and Nat Turner proved long since to the Negro the present hopelessness of physical defence [sic]."<sup>288</sup> At the same time, his chapter "Of the Coming of John," a tale of violence and private honor, shows an appreciation for the distinction between foolish political violence and essential private self-defense.<sup>289</sup> It happens again in Du Bois's response to a 1916 lynching in Florida:

No colored man can read an account of the recent lynching at Gainesville, Fla., without being ashamed of his people. . . . Without resistance they let a white mob whom they outnumbered two to one, torture, harry and murder their women, shoot down innocent men entirely unconnected with the alleged crime, and finally to cap the climax, they caught and surrendered the wretched man whose attempted arrest caused the difficulty.

No people who behave with the absolute cowardice shown by these colored people can hope to have the sympathy or help of the civilized folk. . . . In the last analysis lynching of Negroes is going to stop in the South when the cowardly mob is faced by effective guns in the hands of people determined to sell their souls dearly.<sup>290</sup>

Writing after the 1919 Chicago race riot Du Bois again deployed the strategic dichotomy, acknowledging—indeed encouraging—lawful self-defense but warning against violence as a political strategy:

Today we raise the terrible weapon of Self-Defense. When the murderer comes, he shall no longer strike us in the back. When the armed lynchers gather, we too must gather armed. When the mob moves, we propose to meet it with bricks and clubs and guns.

But we must tread here with solemn caution. We must never let justifiable self-defense against individuals become blind

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<sup>288</sup> W.E.B. Du Bois, *The Souls of Black Folks*, in *THREE NEGRO CLASSICS* 207, 347 (1965).

<sup>289</sup> See SHAPIRO, *supra* note 26, at 127 (describing the story of John Jones, an educated black man, who would face a lynch mob for his "suicidal" act of killing a white man when he observed the man attempting to rape Jone's sister).

<sup>290</sup> *Id.* at 91 (alteration in original) (internal quotation marks omitted).

and lawless offense against all white folk. We must not seek reform by violence.<sup>291</sup>

The power of the self-defense impulse was not lost on the Black clergy. Bishop John Hurst called on Blacks to exercise Christian virtue but if assailants persist then “do what self respecting people should do—namely use his gun with effect and impose respect.”<sup>292</sup> Some in the Black press even urged armed self-defense without explicit concern for the spill over into collective violence. “Let every Negro arm himself . . . and swear to die fighting in defense of his home, his rights and his person,” editorialized the *New York Commoner*.<sup>293</sup>

Marcus Garvey’s Universal Negro Improvement Association presents an interesting variation on the theme. Garvey openly advocated the most extreme form of political violence arguing that, “All peoples have gained their freedom through organized force. . . . These are the means by which we as a race will climb to greatness.”<sup>294</sup> Garvey’s hedge was that this violence would not be carried out in America or Europe, but in Africa

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<sup>291</sup> W.E.B. Du Bois, *Let Us Reason Together*, 18 CRISIS 231, 231 (1919). By the late 1940s, Du Bois saw the fortunes of Blacks better served by more left leaning radical affiliations. While the leadership of the NAACP cast its lot with Truman and the Democratic Party, Du Bois joined Paul Robeson and more radical Black activist to Henry Wallace of the Progressive Party. SHAPIRO, *supra* note 26, at 388–89. These more radical affiliations gave Du Bois new opportunities to engage the question of political violence. In a 1946 speech to the radical Southern Negro Youth Congress, Du Bois would not claim “that the uplift of mankind never calls for force and death” even though his core skepticism about the utility of political violence shone through in the conclusion that “we ought to be the last to believe that force is ever the final word.” *Id.* at 389 (internal quotation marks omitted). In 1957, Du Bois, reflecting on his earlier assessments of violence as a political tool acknowledged:

There was a time . . . when I thought that the only way in which progress could be made in the world was by violence. I thought that the only way that the darker people were going to get recognition was by killing a large number of white people. But I think that most of us are beginning to realize that it is not true, that the violence that accompanies revolution is not the revolution. The revolution is the reform, is the change in thought, is the change of attitude on the people who are affected by it.

*Id.* at 449 (internal quotation marks omitted). In 1959, Du Bois again suggested a greater tolerance for violence as a political tool, in his expression of ambivalence about King’s criticism of Robert F. Williams: “[I]t is a very grave question as to whether or not the slavery and degradation of Negroes in American has not been unnecessarily prolonged by the submission to evil.” W.E.B. DU BOIS, *Crusader Without Violence*, NAT’L GUARDIAN, Nov. 9, 1959, in W.E.B. DU BOIS: A READER 361, 361 (David Levering Lewis ed., 1995).

<sup>292</sup> Lawrence Levine, *Marcus Garvey and the Politics of Revitalization*, reprinted in BLACK LEADERS OF THE TWENTIETH CENTURY 105, 113 (John Hope Franklin & August Meier eds., Univ. Ill. Press 1982).

<sup>293</sup> *Id.*

<sup>294</sup> SHAPIRO, *supra* note 26, at 163 (internal quotation marks omitted). “The Negro must now organize all over the world, 400,000,000 strong to administer to our oppressors their Waterloo.” Marcus Garvey, *Editorial Letter*, NW (Chicago, IL), 11 Oct. 1919, reprinted in 2 THE MARCUS GARVEY AND UNIVERSAL NEGRO IMPROVEMENT ASSOCIATION PAPERS 41–42 (Robert A. Hill ed. 1983).

where organized Blacks would retake what was properly theirs.<sup>295</sup>

But Garvey also deployed the strategic dichotomy, pressing the distinction between political violence, which he seemed to admit could not succeed in the United States, and private self-defense against imminent threats. Garvey challenged the Klan: “They can pull off their hot stuff in the south, but let them come north and touch Philadelphia, New York or Chicago and there will be little left of the Ku Klux Klan. . . . Let them try and come to Harlem and they will really have some fun.”<sup>296</sup>

A. Philip Randolph deployed the strategic dichotomy in his two stage “immediate program” to combat lynching.<sup>297</sup> The second stage depended on Blacks developing economic power.<sup>298</sup> But the first was physical action in self-defense. In an editorial in the *Messenger*, Randolph argued that there was no tension between the avowed pacifist views of the *Messenger* and his advocacy of self-defense: He argued that self-defense was “universal law”<sup>299</sup>:

Always regard your own life as more important than the life of the person about to take yours, and if a choice has to be made between the sacrifice of your life and the loss of the

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<sup>295</sup> See SHAPIRO, *supra* note 26, at 167–68 (“At the 1924 UNIA convention Garvey favored and secured the adoption of a somewhat equivocal resolution regarding the Klan. On the one hand, the resolution stated that the ‘alleged’ attitude of the Klan toward blacks was fairly representative of the feelings of whites toward blacks and so the only solution was establishment of a black government in Africa.”). Garvey’s views were still sufficiently immoderate that the movement was continuously the target of surveillance by British and American intelligence services and police:

J. Edgar Hoover recorded that Garvey was particularly active “among the radical elements in New York City in agitating the negro movement” and expressed his regret that Garvey had “not yet” violated any federal law and so could not be deported as an undesirable alien. Hoover suggested, however, that it might be possible to prosecute Garvey on fraud charges. Ultimately . . . the federal government succeeded in convicting Garvey of mail fraud and, upon President Coolidge’s commutation of the sentence in 1927, deported him from the United States.

*Id.* at 167 (footnote omitted); see also PEEKS, *supra* note 260, at 192–93 (describing Garvey’s meeting with Klan leaders).

<sup>296</sup> SHAPIRO, *supra* note 26, at 167 (alteration in original) (internal quotation marks omitted). Later Garvey actually met with Edward Young Clark, imperial Wizard of the Klan and advised that it “will not help us to fight it or its program” because the solution was creation of a Black government in Africa.” *Id.* Garvey embraced “racial purity” and social separation of the races. Along with claims that the Fascists had borrowed their ideology from him, these views diminished Garvey’s appeal. *Id.*

<sup>297</sup> JERVIS ANDERSON, A. PHILIP RANDOLPH: A BIOGRAPHICAL PORTRAIT 115 (1986).

<sup>298</sup> *Id.* (“When no profits are to be made from race friction no one will longer be interested in stirring up race prejudice. . . . When you make a thing unprofitable you make it impossible.” (alteration in original) (internal quotation marks omitted)).

<sup>299</sup> CORNELIUS L. BYNUM, A. PHILIP RANDOLPH AND THE STRUGGLE FOR CIVIL RIGHTS 95 (2000). But see SHAPIRO, *supra* note 26, at 228 (noting the “southern phenomenon” in which any individual act of Black resistance to oppression and intimidation became transformed into a mass assault upon the Black community as a whole).

lyncher's life, choose to preserve your own and to destroy that of the lynching mob.<sup>300</sup>

Roy Wilkins grappled openly with the strategic dichotomy in a 1936 article in *Crisis*, recounting the lynching in Gordonsville, Virginia of William Wales and his sister Cora.<sup>301</sup> The Wales' had resisted the town's attempt to buy their property for expansion of a cemetery. Officials sought to pressure William with the charge that he had threatened a white woman. When the sheriff came to serve the warrant, William shot him.<sup>302</sup> The next day a crowd of 5,000 surrounded the house. The Wales resisted with shotgun and rifle fire until nightfall when the home was torched.<sup>303</sup>

Noting that members of the mob entered the smoldering building and hacked up the bodies for souvenirs, Wilkins acknowledged the rage of Blacks living under lynch law with bitter sarcasm:

If the tradition of American lynchers was faithfully followed, there reposes now on the mantelpieces of many a Virginia home a bit of flesh or a bone preserved in a jar of alcohol to remind children and grandchildren of the indomitable courage of a brother, father or son of the family who battled to the death to prevent two Negros from overcoming 5,000 white Virginians.<sup>304</sup>

Then, recognizing the political risk of the implication, Wilkins asked, "Does *The Crisis* mean to imply by this article that its policy is to defend colored people who kill sheriffs?"<sup>305</sup> On this question, Wilkins contended that Blacks had to support the existing legal structure.<sup>306</sup> But he was clearly conflicted: He acknowledged the pull of the self-defense impulse and the private pressures that motivated individuals like William Wales who "saw his people hanged, roasted and mutilated by mobs while legislators called points of order and an aspirant to the Presidency fiddled with clauses, periods and commas in the so-called Bill of Rights."<sup>307</sup> On the explicit point of the utility and legitimacy of armed self-defense, Wilkins said this:

If one has a fancy for words, this killing was not a lynching.  
It was sport-sport on a grand scale. . . . Hunting possum

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<sup>300</sup> SHAPIRO, *supra* note 26, at 228.

<sup>301</sup> *Id.* at 288.

<sup>302</sup> *Id.* at 289.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> Roy Wilkins, *Two Against 5,000*, *CRISIS*, June, 1936, at 169, 170, reprinted in HERBERT APTHEKER, 4 *DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES* 240-44 (1994).

compared to this is tiddlywinks. . . . There was a slight flaw in the set-up however. The man and woman had arms and they were not afraid to shoot. They had killed a sheriff and wounded five others. The leaders of the five thousand looked about and took counsel together. They had numbers. They had machine guns. They had sulphur bombs. . . . But the two in the house had rifles, shotguns and perhaps a pistol or two. Not so good. Not half as good as a lone Negro with nothing but his bare hands. . . . No this was a different proposition . . . .

Yes, the *Crisis* defends William and Cora Wales.<sup>308</sup>

The restrictive leg of the strategic dichotomy is evident in the case of the Scottsboro boys.<sup>309</sup> Early on, the Communist Party used the case as the centerpiece of a recruiting focus in the American South.<sup>310</sup> This prompted conflicts between Communists and the NAACP over strategy and mutual denunciations highlighting their competing approaches of coalition building and radical upheaval. In the candidly titled *The Right to Revolution for the Negro People*, communist spokesman James W. Ford underscored the revolutionary heritage of insurrection, exalting Nat Turner, Gabriel Prosser and Denmark Vesey “and scores of other Negro revolutionary leaders.”<sup>311</sup>

The NAACP had hired Clarence Darrow as counsel for the Scottsboro appeal “in a belated effort to compensate for the association’s rather slight attention to the case at the beginning.”<sup>312</sup> Darrow conveyed the Association’s position that the Communists’ radical strategy, including threats to “officials and citizens of Alabama if the verdict of death should be carried out,” were counter-productive.<sup>313</sup>

During the modern civil rights era the strategic dichotomy was deployed repeatedly and debated publicly. Though the stakes were tremendous, the leadership upheld the fundamental utility and legitimacy of armed self-defense. This is vividly illustrated by the Robert F. Williams controversy. After service in the Marines, Williams returned home to Monroe, North Carolina where he was elected President of the Monroe branch of the NAACP.<sup>314</sup> In 1957, he began organizing a group of armed

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<sup>308</sup> APTEKER, *supra* note 307, at 241–44.

<sup>309</sup> SHAPIRO, *supra* note 26, at 210.

<sup>310</sup> *Id.* at 211.

<sup>311</sup> *Id.* at 218 (internal quotation marks omitted).

<sup>312</sup> *Id.* at 211.

<sup>313</sup> *Id.* (internal quotation marks omitted).

<sup>314</sup> Julian Mayfield, *Challenge to Negro Leadership: The Case of Robert Williams*, in REPORTING CIVIL RIGHTS: PART ONE AMERICAN JOURNALISM 1941–1963, at 550, 560 (2003) [hereinafter *Challenge to Negro Leadership*].

men to defend Monroe's Black community.<sup>315</sup> In October 1957, Williams led an armed group to protect Dr. Albert Perry from a Klan attack.<sup>316</sup>

But it was Williams' apparent endorsement of political violence that prompted the NAACP to suspend him from leadership of the Monroe branch.<sup>317</sup> In widely circulated reaction to the acquittal of a white man for the rape of a pregnant Black woman, Williams said this:

We cannot take these people who do us injustice to the court and it becomes necessary to punish them ourselves. In the future we are going to have to try and convict them on the spot. We cannot rely on the law. We can get no justice under the present system. If we feel that injustice is done, we must right then and there, on the spot, be prepared to inflict punishment on these people. Since the Federal government will not bring a halt to lynching in the South, and since the so-called courts lynch our people legally, *if it's necessary to stop lynching with lynching*, then we must be willing to resort to that method.<sup>318</sup>

Williams' statement confirmed the perennial worry about advocacy of political violence. National headlines blazed, "N.A.A.C.P. Leader Urges 'Violence'".<sup>319</sup> The *Carolina Times* called it the biggest civil rights story of 1959.<sup>320</sup> Southern editorials attributed Williams' "bloodthirsty remark" directly to the National office.<sup>321</sup> Thomas Waring of the *Charleston News and Courier*, ranted, "Hatred is the stock in trade of the NAACP. High

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<sup>315</sup> TYSON, *supra* note 143, at 87.

<sup>316</sup> *Challenge to Negro Leadership*, *supra* note 314, at 560–61.

It was just another good time Klan night, the high point of which would come when they dragged Dr. Perry over the state line if they did not hang him or burn him first. But near Dr. Perry's home their revelry was suddenly shattered by the sustained fire of scores of men who had been instructed not to kill anyone if it were not necessary. The firing was blistering, disciplined and frightening. The motorcade of about eighty cars, which had begun in a spirit of good fellowship, disintegrated into chaos, with panicky, robed men fleeing in every direction. Some abandoned their automobiles and had to continue on foot.

JAMES FORMAN, *THE MAKING OF BLACK REVOLUTIONARIES* 167 (1972) (internal quotation marks omitted).

<sup>317</sup> *N.A.A.C.P. Leader Urges 'Violence': North Carolina Aide Makes Statement—Association Quickly Suspends Him*, N.Y. TIMES, May 7, 1959, at 22 [hereinafter *N.A.A.C.P. Leader*].

<sup>318</sup> SHAPIRO, *supra* note 26, at 459 (emphasis added); *see also* TYSON, *supra* note 143, at 87–89 (describing how men from the NAACP defended Dr. Perry's home from an attack by the Ku Klux Klan); ROBERT F. WILLIAMS, *NEGROES WITH GUNS* 62 (Wayne St. Univ. Press ed., 1998) (1962) (discussing how African Americans in Monroe had to resort to arming themselves in order to prevent "mass bloodshed").

<sup>319</sup> *N.A.A.C.P. Leader*, *supra* note 317, at 22.

<sup>320</sup> TYSON, *supra* note 143, at 149 (internal quotation marks omitted).

<sup>321</sup> *Id.* at 150.

officials of the organization may speak in cultivated accents and dress like Wall Street Lawyers, but they are engaged in a revolutionary enterprise.”<sup>322</sup>

As soon as word of Williams’s statement reached NAACP headquarters in New York, National Director Roy Wilkins called Williams. Wilkins recorded the call.<sup>323</sup> Hearing that Williams was planning to make a follow-up statement on national television, Wilkins warned, “You know, of course . . . that it is not the policy of the NAACP to advocate meeting lynching with lynching. You are going to make it clear that you are not speaking for the NAACP?”<sup>324</sup> After a tense conversation, and realizing that Williams already had been inexorably linked with the NAACP, Wilkins dispatched a telegram to Williams, suspending him as branch president.<sup>325</sup>

Williams appealed his dismissal to the membership at the 1959 annual convention.<sup>326</sup> The representatives upheld the decision to suspend Williams but added an important caveat: “[W]e do not deny but reaffirm the right of an individual and collective self-defense against unlawful assaults.”<sup>327</sup> The report of the Resolutions Committee that brought the issue to the floor noted in its Preamble, the NAACP’s long support of the right of self-defense, “by defending those who have exercised the right of self-defense particularly in the Arkansas Riot Case, The Sweet case in Detroit, the Columbia, Tenn., Riot cases and the Ingram case in Georgia.”<sup>328</sup>

This public engagement of the strategic dichotomy is underscored and systematized by Martin Luther King’s separate assessment of the Williams controversy.<sup>329</sup> In a widely reprinted exchange of essays with Williams, King articulated three distinct categories of response to violent attacks and political oppression. The first, pure nonviolence, is difficult, King said. It “cannot readily or easily attract large masses, for it requires extraordinary discipline and courage.”<sup>330</sup> The second response, said King,

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<sup>322</sup> *Id.*

<sup>323</sup> TYSON, *supra* note 143, at 150.

<sup>324</sup> *Id.* at 150–51 (internal quotation marks omitted).

<sup>325</sup> *Id.* at 151; WILKINS & MATHEWS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS*, *supra* note 99, at 265. Wilkins’s account is quoted in *Challenge to Negro Leadership*, *supra* note 314, at 552.

<sup>326</sup> WILLIAMS, *supra* note 318, at 28–30. For full text of the resolutions see Gloster B. Current, *Fiftieth Annual Convention: A Jubilee for Civil Rights*, *CRISIS* (Aug.–Sept. 1959), at 400, 408.

<sup>327</sup> Current, *supra* note 326, at 409–10 (emphasis added).

<sup>328</sup> *Id.* at 408–09 (emphasis added).

<sup>329</sup> *LIBERATION*, Sept.–Oct. 1959. Both Essays are printed in *SOUTHERN PATRIOT* 18, No. II (Jan. 1960) at 3. An edited version of the essay appears in *THE EYES ON THE PRIZE CIVIL RIGHTS READER*. Martin Luther King, Jr., “*The Social Organization of Non-Violence*”, in *THE EYES ON THE PRIZE CIVIL RIGHTS READER* 112, 112–14 (Clayborn Carson et. al. eds., Penguin 1991); see also WILLIAMS, *supra* note 318, at xxvi–vii (quoting Martin Luther King, Jr.).

<sup>330</sup> King, Jr., *supra* note 329, at 112.

was implicit in the freedom struggle and should not discourage outsiders from supporting the movement:

Violence exercised merely in self-defense . . . [in] all societies, from the most primitive to the most cultured and civilized, accept as moral and legal. The principle of self-defense, even involving weapons and bloodshed, has never been condemned, even by Gandhi. . . . When the Negro uses force in self-defense . . . he does not forfeit support—he may even win it, by the courage and self-respect it reflects.<sup>331</sup>

This explicit endorsement of armed self-defense, contrasted with King's third assessment, puts the strategic dichotomy in high relief. The third approach, Williams's approach, said King, advocated "violence as a tool of advancement, organization as in warfare . . . [and posed] incalculable perils."<sup>332</sup> Political goals, King argued, were best achieved by nonviolent, "socially organized masses on the march."<sup>333</sup>

Anne Braden reprinted the King and Williams essays in the *Southern Patriot* and her summary succinctly captured King's engagement of the strategic dichotomy. No one disputes the right to defend home and family she explained, "What the nonviolent movement says is that the weapons of social change should be nonviolent."<sup>334</sup>

King's assessment was only one aspect of a robust community engagement of the strategic dichotomy. Louis Lautier of the *Baltimore Afro-American* argued that Williams had not advocated political violence, but merely that "colored people should defend themselves if and when violence is directed at them."<sup>335</sup> In the *Arkansas State Press*, Daisy and L.C. Bates were equivocal on Roy Wilkins' contention that Williams had crossed the line into advocacy of political violence. But they were firm on the importance of private self-defense, warning "nonviolence never saved George Lee in Belzoni, Miss., or Emmett Till, nor Mack Parker at Poplarville, Miss."<sup>336</sup>

The National office also received protests from the branches.<sup>337</sup> The Brooklyn Branch of the NAACP wired Wilkins in protest of the "illegal and arbitrary removal from office of Robert E. Williams for expressing

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<sup>331</sup> TYSON, *supra* note 143, at 215 (internal quotation marks omitted).

<sup>332</sup> King, Jr., *supra* note 329, at 113.

<sup>333</sup> *Id.*

<sup>334</sup> TYSON, *supra* note 143, at 216.

<sup>335</sup> *Id.* at 154.

<sup>336</sup> *Id.* (internal quotation marks omitted). Bates responding to blandishments from Wilkins ultimately supported the suspension of Williams. *See id.* at 164.

<sup>337</sup> The Flint Michigan Branch demanded his "immediate reinstatement." TYSON, *supra* note 143, at 156-57 (citing Box 2 CCRI Papers).



sentiments to which we subscribe.”<sup>338</sup> This and other unqualified support for Williams arguably ranged over the line into advocacy of political violence.<sup>339</sup>

But the thoughtful establishment support, was exhibited by John McCray, in a *Baltimore Afro-American*, article titled, “*There’s Nothing New About It.*” McCray engaged the strategic dichotomy in candid, practical terms. On issues of social change he said, “A minority group cannot hope to win in campaigns of violence”.<sup>340</sup> On the other hand, McCray acknowledged, without criticism, that Black self-defense had deep roots. “Today, thousands of our people have secured ‘protection’ in their homes, mostly with the intent to repel night riders who, years ago, were terrors to their forbearers.”<sup>341</sup>

With debate raging, Wilkins defended his position with a succinct deployment of the strategic dichotomy. In a pamphlet entitled *The Single Issue in the Robert William’s Case*, Wilkins argued, “There is no issue of self-defense . . . The charges are based on his call for aggressive, premeditated violence. Lynching is never defensive.”<sup>342</sup> In this, Wilkins articulated a philosophy dating back to Fredrick Douglass. While condemning political violence as a hazard to the movement, he unequivocally recognized armed self-defense as a crucial private resource. At a June 1959 fundraising dinner in Chicago, Wilkins emphasized, “Of course, we must defend ourselves when attacked. This is our right under all known laws.”<sup>343</sup>

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<sup>338</sup> *Id.* at 156.

<sup>339</sup> Adams wrote to Wilkins, “I support Williams one million percent . . . Why can’t we do like the Indians did down in Carolina last year.” *Id.* at 157. This is an apparent reference to 1957 the routing of a Klan rally near Maxton, North Carolina by a group of several hundred Lumbee Indians. The event was the culmination of the efforts of James “Catfish” Cole to rebuild his Klan following after being run off from Monroe, North Carolina by Robert Williams.

After the altercation with Williams, Cole retreated to Robeson County where the population was equal parts white, Black and Lumbee Indians. TIMOTHY TYSON, *BLOOD DONE SIGN MY NAME* 56 (2004). Cole held a series of Klan Rallies. The final event was supposed to draw five thousand armed Klansmen with the aim of showing the Lumbees “their place”. *Id.* (internal quotation marks omitted). Lumbee leader, Simeon Oxendine, who had flown thirty missions against the Germans in World War II, planned the Indian’s response. As Cole’s rally began, five hundred armed Lumbee gathered in the surrounding darkness. *Id.* at 57. When Cole started to speak, one of the Lumbees swooped in, dousing the single light illuminating Cole. *Id.* The other Lumbees gave a war cry and fired their guns into the air. The Klansmen dropped their guns and ran for their cars. *Id.* Cole fled into the swamp, leaving his wife, Carolyn, behind. Carolyn tried to flee in Cole’s Cadillac, but got stuck in a ditch. After setting fire to the Klan’s cross, hanging Cole in effigy, the Lumbees helped push Carolyn out of the ditch. “Draped in Klan regalia, they celebrated into the night. The cover of *Life* magazine featured a playful photograph of a beaming Simeon Oxendine wrapped in a confiscated Ku Klux Klan banner.” *Id.* Four people were injured, apparently by falling bullets. *Id.*

<sup>340</sup> TYSON, *supra* note 143, at 158.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.* at 163.

<sup>343</sup> *Id.*

Wilkins reiterated this position throughout his life. In his 1982 memoir, Wilkins confirmed, “Like [Robert] Williams, I believe in self-defense. While I admire Reverend King’s theories of overwhelming enemies with love, I don’t think I could have put those theories into practice myself. But there is a difference between self-defense and murder, and I had no intention of getting the NAACP into the lynching business.”<sup>344</sup>

The Williams case is remarkable for the detail in which it elaborates the strategic dichotomy. But it is not unique. On at least two other occasions, Roy Wilkins defended the strategic dichotomy against statements he worried blurred the line between self-defense and political violence. In 1959, an angry Charles Evers made provocative statements after a car bomb attack on Natchez, Mississippi NAACP leader, George Metcalf. Like Robert Williams before him, Evers generally rejected political violence as fruitless, declaring, “The only way we have is through nonviolence, there’s no other way.”<sup>345</sup> But following the attack on Metcalf, Evers channeled the mood of the community, “We’re not going to take it any longer. We’re not going to start any riots, but we’ve got guns and we’re going to fight back.”<sup>346</sup> A day later, after Governor Paul Johnson ordered guardsmen to Natchez, Evers was urging the community that group violence would be counterproductive.<sup>347</sup>

From the National office, Roy Wilkins responded in a September 3, letter, “We have never authorized you, as our representative, to state either privately or publically, ‘we are armed, we have taken all we will take, we will fight . . . or any sentiments approximating that language. [We cannot] afford these damaging statements in a nationally syndicated newspaper column.”<sup>348</sup> Wilkins demanded that Evers clarify his statements by September 10. After a follow-up statement by Evers in the *New York Post*, that Wilkins considered unsatisfactory, he drafted but never sent a letter demanding Evers resign by September 15.<sup>349</sup> The reasons for Wilkins’ retreat are unclear.<sup>350</sup> But the episode shows again vigorous engagement and defense of the strategic dichotomy.

Wilkins already had experienced a similar conflict with St. Augustine, Florida activist, Robert Hayling, a Black dentist who had led local voter

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<sup>344</sup> ROY WILKINS, *STANDING FAST: THE AUTOBIOGRAPHY OF ROY WILKINS* 265 (1982).

<sup>345</sup> ROBERT PENN WARREN, *WHO SPEAKS FOR THE NEGRO?* 105 (1965).

<sup>346</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 126 (internal quotation marks omitted).

<sup>347</sup> *Id.* at 126–27.

<sup>348</sup> TYSON, *supra* note 143, at 150–51.

<sup>349</sup> WENDT, *SELF-DEFENSE*, *supra* note 121, at 128.

<sup>350</sup> Some suggest it may have been Wilkins’s own recognition of his waning power. *Id.* at 128.

registration and desegregation efforts.<sup>351</sup> After a shotgun attack on his home, Hayling organized an armed defense squad.<sup>352</sup> He warned the Klan publicly that his guards would “shoot first and ask questions later.”<sup>353</sup> Roy Wilkins responded as he had to Robert Williams, and Hayling broke ties with the NAACP.<sup>354</sup> But in a familiar turn of the strategic dichotomy, when Martin Luther King came to St. Augustine in 1964 he consented to Hayling’s deployment of armed guards for protection.<sup>355</sup>

CORE Chairman, James Farmer, pressed the strategic dichotomy aggressively when responding to questions about the militancy of the Deacons for Defense, who were protecting CORE workers in the South. Farmer made a clear distinction between armed self-defense “outside” the movement and CORE’s nonviolent demonstrations. “*You must understand, when a man’s home is attacked that’s not the movement, that’s his home.*”<sup>356</sup>

Simon Wendt comments, “[CORE’s] legitimacy as an acceptable Civil Rights organization as well as its financial wellbeing depended almost exclusively on white Northern liberals, who easily confused the acknowledge right of self-defense with the specter of ‘Black violence.’”<sup>357</sup> Pressed on the point that CORE demonstrations involving the Deacons for Defense happened in the streets not the home, Farmer stubbornly insisted that armed self-defense and political violence were fundamentally different.<sup>358</sup>

Committed pacifists within CORE considered members who advocated violent self-defense traitors to the cause.<sup>359</sup> But nonviolence in the face of imminent threats was easier in theory than in practice.<sup>360</sup> In response to

<sup>351</sup> Robert W. Hartley, *A Long Hot Summer: The St. Augustine Racial Disorders of 1964*, in ST. AUGUSTINE, FLORIDA, 1963–1964: MASS PROTEST AND RACIAL VIOLENCE 3, 17 (David J. Garrow ed., 1989).

<sup>352</sup> *Id.* at 20–21.

<sup>353</sup> *Id.* at 21.

<sup>354</sup> *See id.* at 21–22 (describing Wilkins’s phone call).

<sup>355</sup> *See* DAVID R. COLBURN, RACIAL CHANGE AND COMMUNITY CRISIS: ST. AUGUSTINE, FLORIDA 1877–1980, at 84–85 (1985) (discussing Dr. King’s reluctant acceptance of Hayling’s guards and the FBI as protection in St. Augustine and the tensions between the two groups); *see also* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE 317–34 (1986) (discussing security concerns at St. Augustine).

<sup>356</sup> Simon Wendt, *Urge People Not to Carry Guns: Armed Self-Defense in the Louisiana Civil Rights Movement and the Radicalization of the Congress of Racial Equality*, 45 LA. HIST. 261, 280 (2004).

<sup>357</sup> *Id.* at 279.

<sup>358</sup> *Id.* at 280.

<sup>359</sup> *Id.* at 277.

<sup>360</sup> “Pacifist CORE worker Meldon Acheson found himself the last representative of an insignificant minority. ‘Nearly everyone in the community is armed to the teeth’ he wrote in a letter to his parents . . . all but one are [sic] committed to nonviolence only as a tactic.” *Id.* His attempts to convert the local Black population to philosophical nonviolence soon fizzled. *Id.* In West Feliciana Parish, CORE worker Mike Lesser was less conflicted: “We are preaching non-violence, but we can

reports that local Blacks were arming against private threats, the national leadership of CORE pressed its field staff, "Urge the people not to carry guns."<sup>361</sup> These instructions prompted tensions and defiance.<sup>362</sup> In a staff meeting at the end of 1963 two activists angrily responded "to hell with CORE, we're with the people."<sup>363</sup> Some CORE field staff began carrying guns themselves.<sup>364</sup>

CORE's National Office wrestled with the perennial concern of Black civil rights groups that have depended on alliances with white progressives.

National Director James Farmer had to be more cautious in dealing with the issue of armed resistance. . . . The organization's legitimacy as an acceptable Civil Rights organization as well as its financial wellbeing depended almost exclusively on white Northern liberals, who easily confused the acknowledged, right of self-defense with the specter of "Black violence." . . . Letters by white CORE sympathizers to James Farmer served as an additional reminder about the fragility of Northern support. "Although only a small percentage of whites will help actively," a white man from New Jersey wrote in 1963, "the majority feel guilty and will not oppose the Negro's advance as long as it is nonviolent," and only if CORE maintained its nonviolent image would "sympathetic bystanders" continue to support the organization.<sup>365</sup>

The subsequent history and radicalization of CORE perhaps confirms the assessment that advocacy of political violence would destroy interracial alliances.<sup>366</sup> While CORE continued to espouse nonviolence and to

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only preach non violence. We cannot tell someone not to defend his property and the lives of his family and let me tell you, these 15-20 shotguns guarding our meetings are very reassuring." *Id.*

<sup>361</sup> *Id.* at 278.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> FRED POWLEDGE, *FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT* 573 (1991).

<sup>365</sup> Wendt, *supra* note 356, at 279.

<sup>366</sup> The assumption, that political violence was an entirely losing strategy also is complicated by mounting challenges to the view that the successes of the Civil Rights movement were entirely rooted in nonviolence. Studies of the Civil Rights movement have matured, beyond the early treatments that focused on organizations and leaders like Martin Luther King. *Id.* at 263. "In the mid 1980's the focus of the literature began to shift toward the study of local movements and the contribution of ordinary Black citizens . . . . [S]ome of the most recent studies suggest that . . . armed self-defense was more than a mere footnote to the history of the Black freedom struggle." *Id.*; see also Christopher B. Strain, "We Walked Like Men": *The Deacons for Defense and Justice*, 38 *LA. HIST.* 43, 43-62 (1999) (providing a historical account of the rise of the Deacons for Defense and CORE's eventual aligning with many of the groups views); Aniyela O. Umoja, *The Ballot and the Bullet: Comparative Analysis*

distance itself from the publicity the Deacons for Defense were attracting, the realities of imminent threats eroded the commitment to non-violence in the field.<sup>367</sup> The work of the Deacons underscored the fundamental necessity of self-defense and drew CORE field workers and members to more openly advocate resistance against violent attacks.<sup>368</sup>

The Deacons made a firm rhetorical commitment to the strategic dichotomy. In 1965, Deacon spokesman Charles Sims emphasized, "I believe nonviolence is the only way. Negotiations are going to be the main point in this fight. . . . As a Deacon, you cannot fire on a man unless you've been attacked."<sup>369</sup> For the Northern, white, middle-class pacifists who had been the backbone of CORE, the idea of armed violence, even tempered by the strategic dichotomy, was anathema.<sup>370</sup> CORE leadership attempted to keep the Deacons "in the background."<sup>371</sup>

But for the growing Black membership of CORE, the practical necessity of armed self-defense in the field was obvious. "As early as 1965 . . . delegates openly contested the . . . commitment to pacifism . . . during CORE's annual convention."<sup>372</sup> By 1966, Floyd McKissick had succeeded James Farmer as National Director of CORE.<sup>373</sup> Though McKissick maintained a commitment to tactical nonviolence,<sup>374</sup> his ascension marked a dramatic shift of policy and his rhetoric was more aggressive. He insisted, for example, that, "The right of self-defense is a constitutional right and you can't expect Black people to surrender this right while whites maintain it."<sup>375</sup> For CORE's pacifist, white members, this broke the bargain. By the end of 1966, CORE had lost most of its white support and transformed into an almost entirely Black organization.<sup>376</sup>

The visceral draw of the self-defense impulse and the difficulty of maintaining the strategic dichotomy against spillover into political violence

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*of Armed Resistance in the Civil Rights Movement*, 29 J. BLACK STUD. 558, 558–78 (1999) [hereinafter Umoja, *The Ballot and the Bullet*] (concluding that many factors including class orientations, leadership paradigms, organizing styles, and changing cultural climates were responsible for the transformation of the views of CORE leadership).

<sup>367</sup> "Farmer continued to reject the ostensible danger that the Deacons posed to CORE's non-violent stance. In reality though, by 1965, most CORE activists had abandoned philosophical nonviolence." Wendt, *supra* note 356, at 280.

<sup>368</sup> *Id.* at 281–82.

<sup>369</sup> *Id.* at 276.

<sup>370</sup> JAMES FARMER, *FREEDOM—WHEN?* 65 (1965).

<sup>371</sup> Wendt, *supra* note 356, at 279 n.82.

<sup>372</sup> *Id.* at 281.

<sup>373</sup> *Id.* at 284.

<sup>374</sup> *Id.*

<sup>375</sup> CIVIL RIGHTS 1960–66, at 377 (Lester A. Sobel, ed., 1967).

<sup>376</sup> Wendt, *supra* note 356, at 284–85; *see also* TYSON, *supra* note 143, at 290–91 nn.15–18 (discussing CORE's abandonment of nonviolence and the acceptance of self-defense as natural and necessary).

are illustrated again in the events surrounding the shooting of James Meredith in 1966. A veteran of the freedom struggle,<sup>377</sup> with a commitment to nonviolence, Meredith was ambushed by a white gunman on the first day of his “Mississippi March Against Fear.”<sup>378</sup> Interviewed from his hospital bed, an angry Meredith made national headlines declaring, “I’m sorry I didn’t have something to take care of that man.”<sup>379</sup> In future travels through Mississippi, Meredith told reporters he would be armed.<sup>380</sup> In some sense Meredith’s statement conveyed a simple intent to defend himself. But in context, the danger that it would incite political violence is plain. That worry is underscored by the debate and decisions that followed.

Despite the attack on Meredith, CORE vowed to continue the “March Against Fear.” There was an obvious concern about the safety of the participants and a corresponding worry that security measures would be considered provocative.

During the organizational meetings, national Civil Rights Leaders engaged in vigorous debate about armed self-defense. This question, along with the debates about the role of whites and the hesitancy of the federal government to support the movement eventually split the frail coalition. When Floyd McKissick, CORE’s new director, Martin Luther King, Jr., of the Southern Christian Leadership Conference and Stokely Carmichael of SNCC signed a manifesto highly critical of the Johnson administration and agreed to have the Deacons for Defense and Justice protect the march, the NAACP’s Roy Wilkins and the Urban League’s Whitney Young, Jr., angrily withdrew their support.<sup>381</sup>

The alignment of King, McKissick, and Carmichael against Roy Wilkins and Whitney Young illustrates the spectrum of circumstances along which the strategic dichotomy might be deployed and the risk that accompanies aggressive renditions of it. Wilkins and the NAACP had comfortably exercised the careful conservative rendition of the strategic

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<sup>377</sup> In 1962 Meredith attempted to integrate the University of Mississippi. Wendt, *supra* note 356, at 281.

<sup>378</sup> *Id.*

<sup>379</sup> James H. Meredith, *Big Changes Are Coming*, SAT. EVENING POST, Aug. 13, 1966, at 23–27, available at <http://reportingcivilrights.loa.org/authors/selections.jsp?authorId=135>; Roy Reed, *Meredith Regrets He Was Not Armed*, N.Y. TIMES, June 8, 1966, at 1; see also WENDT, SELF-DEFENSE, *supra* note 121, at 135 (citing *He Shot Me Like . . . a Goddam Rabbit*, NEWSWEEK, June 20, 1966, at 30).

<sup>380</sup> *Supra* note 380.

<sup>381</sup> Wendt, *supra* note 356, at 281.

dichotomy to support compelling cases of private self-defense. But the “March Against Fear” controversy shows that the strategic dichotomy also could be deployed more aggressively to sanction self-defense preparations that pressed closer to the boundary of political violence. Those aggressive renditions risked spillover to which more cautious leaders like Wilkins were highly averse.

In the wake of the attack on Meredith, continuing protests, especially those employing the Deacons as security, had enhanced political significance and the potential for igniting political violence. On the other hand, with a comrade wounded, members of the coalition had an understandable concern about their personal safety. The diverging calculations of King and Wilkins illustrate different appetites for the risk inherent in aggressive deployments of the strategic dichotomy.

In a much more practical way, the words and deeds of Holmes County, Mississippi farmer and SNCC activist, Hartman Turnbow distill the importance of private self-defense and the basic impulse fueling the strategic dichotomy. When racist terrorists attacked his home, Turnbow “pushed his family out the back door and grabbed the rifle off the wall and started shooting.”<sup>382</sup> Turnbow saw this as perfectly consistent with the non-violent philosophy of the movement declaring, “I wasn’t being *non-violent*, I was protecting my wife and family.”<sup>383</sup>

Turnbow was not alone in this sentiment. After a shootout with Klansmen, Mississippi activist Robert Cooper explained, “I don’t figure that I was violent. All I was doin’ was protectin’ myself.”<sup>384</sup> Charles Evers depicts his brother Medgar’s concurrent commitment to political nonviolence and private self-defense essentially the same way. During the turmoil surrounding James Meredith’s attempt to integrate Ole Miss, “Medgar and Myrlie were barricaded in at home . . . . *Medgar was nonviolent, but he had six guns in the kitchen and living room.*”<sup>385</sup> SNCC activist James Forman, confirms that these episodes reflect broad community norms. Commenting on Hartman Turnbow, Forman observed that “[s]elf-defense—at least of one’s home—was not a concept new to Southern blacks in 1963 and there was hardly a black home in the South

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<sup>382</sup> CARSON, *supra* note 220, at 89; CHARLES E. COBB, JR., ON THE ROAD TO FREEDOM: A GUIDED TOUR OF THE CIVIL RIGHTS TRAIL 302 (2008).

<sup>383</sup> COBB, JR., *supra* note 382, at 302. Turnbow was not dissuaded by the fact that armed self-defense was an imperfect response. The attack came at 3:00 a.m. with a firebomb and then shots fired into Turnbow’s home. Turnbow charged out, “I saw two white men and one of them no sooner he saw me he shot at me. . . . I had my .22 already in position and I just commenced shooting at him right fast.” The aftermath is not surprising. The only arrest made was of Turnbow himself, on the suspicion of setting fire to his own home. MILLS, *supra* note 122, at 96.

<sup>384</sup> Interview with Robert Cooper, in YOUTH OF THE RURAL ORGANIZING CULTURAL CENTER, MINDS STAYED ON FREEDOM: THE CIVIL RIGHTS STRUGGLE IN THE RURAL SOUTH, AN ORAL HISTORY 94 (1991).

<sup>385</sup> EVERS & SZANTON, *supra* note 86, at 117 (emphasis added).

without its shotgun or rifle.”<sup>386</sup>

For most of our history, the Black community has supported armed self-defense by maintaining the strategic dichotomy in the face of tremendous risks. The danger that self-defense would spill over into political violence and destroy crucial white alliances was substantial. The entire movement—the freedom of an entire people—was on the line. On that measure, the traditional costs of armed self-defense<sup>387</sup> were just as great, or greater than, the costs today. Despite that risk, as a matter of practice, philosophy and policy, the community upheld the self-defense interest of individual Blacks who were the victims of criminal aggression and state failure. Though the stakes have been tremendous, the community traditionally did not ask individuals to surrender the self-defense resource to advance group goals. The modern orthodoxy, on the other hand, does exactly that by pressing a recipe for community safety that requires good people to surrender the standard tools of self-defense.<sup>388</sup>

#### IV. THE MODERN ORTHODOXY: EXPLANATION AND CRITICAL EVALUATION

From the very beginning, it has been evident that crucial alliances with white progressives would suffer if the freedom struggle devolved into political violence. Part II showed how despite that risk, Blacks deployed the strategic dichotomy to maintain armed self-defense as a crucial private resource. However, as the civil rights conflict boiled over, urban rioting exacerbated mainstream worries about Black violence, and Black radicals invoked self-defense in a broader sphere that threatened the traditional boundary against political violence. This made the strategic dichotomy harder to maintain conceptually and more costly politically.

Concurrently, alliances between conservative/integrationist civil rights groups and white progressives became more important in the wake of white backlash against Black radicalism and urban rioting.<sup>389</sup> The newly minted national gun control movement rested firmly within that progressive coalition. The conservative/integrationist wing of the movement, with its focus on institutional methodologies of legislation and litigation came to dominate the Black leadership. It is from this

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<sup>386</sup> JAMES FORMAN, *THE MAKING OF BLACK REVOLUTIONARIES* 376 (1985).

<sup>387</sup> Success or failure of the entire movement was arguably on the line.

<sup>388</sup> See Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 840 (2008) (discussing the removal of guns from the population as a means to reduce gun crime) [hereinafter Johnson, *Imagining Gun Control*].

<sup>389</sup> MCADAM, *POLITICAL PROCESS*, *supra* note 256, at 192–93 (“By the off-year elections of 1966 the degree of racial polarization in this country was such that openly to court the black vote was to invite defections among one’s white constituents. Prematurely prophesied three years earlier, the much-heralded ‘white backlash’ had indeed set in.”).



perspective that the traditional support of Black self-defense is dismissed with argument that “things have changed.” This Part will engage these developments.

Section A details the evolution of the modern orthodoxy. Section B argues that traditional Black support for armed self-defense is fundamentally a response to state failure and impotence that continues unabated.

#### A. *The Rise of the Modern Orthodoxy*

The modern orthodoxy is rooted in a particular strand of civil rights advocacy and political strategy that survived competing approaches within the Black freedom movement.<sup>390</sup> The NAACP model is the exemplar of that approach.

Although the NAACP was the dominant civil rights organization in the early stages of the Civil Rights movement, by the 1960s four major groups had emerged. “The result was the highly competitive situation . . . [where] the so called Big-Four organizations—NAACP, the Southern Christian Leadership Conference (“SCLC”), the Student Nonviolent Coordinating Committee (“SNCC”), and CORE—jockeyed with one another for influence over the movement, as well as for the increased shares of publicity and money generated by protest activity.”<sup>391</sup> The philosophical divisions between these groups and the decline of three of them help us understand the modern orthodoxy.<sup>392</sup>

The ascension of the evolving NAACP model and its influence on the modern orthodoxy is significantly attributable to the shifts toward more radical approaches by competing organizations. Flirtations with radicalism tested the utility of political violence.<sup>393</sup> The failure of the radical

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<sup>390</sup> See *id.* at 36 (discussing the political process model).

<sup>391</sup> *Id.* at 154 n.7. In the footnote, McAdam addresses the National Urban League, which some have added to constitute the “Big Five.” *Id.* at 154 n.7, 185 (referencing Goldman who used the term “Big Five”). McAdam argues that the Urban League was influential in “social welfare and business circles,” but far less so “within the movement itself.” The organizations visibility within the “liberal establishment” (foundations, academia, social welfare groups) may help to account for the prominent role ascribed to it by many of the movement’s contemporary chroniclers who were largely drawn from the same establishment.” *Id.* at 154 n.7.

<sup>392</sup> RECORD, *supra* note 163, at 36 (“From its origins the NAACP was limited by the fact that its leaders did not envision it as a mass organization; the ‘Talented Tenth’ orientation, epitomized—almost caricatured—in the stately and aloof Du Bois dominated the top staff.”).

<sup>393</sup> Radical advocacy within the Black freedom struggle is nothing new. Nor is the tension between radicals and more traditional, conservative organizations. This is illustrated by the divide in the 1920s between the NAACP and more radical Black labor organizations. In addition to A. Philip Randolph’s Messenger organization, the African Black Brotherhood (Harlem) and the American Negro Labor Congress (“ANLC”) in Chicago and later the League of Struggle for Negro Rights, all took a more radical stance in the Black freedom struggle. SHAPIRO, *supra* note 26, at 209. After 1930, “the main channel for Communist activity among blacks became a new organization, the League of Struggle for Negro Rights. The league was part of implementing a Communist party decision to pay more

experiments validated a more conservative/integrationist approach. That approach, with its focus on institutional action inside mainstream boundaries, fuels the modern orthodoxy.

Akinyele Umoja argues that the civil rights groups of the 1960's evolved along different trajectories partly because their leadership came from different strata within the Black middle class.<sup>394</sup> He divides the leadership into the categories established by Thomas Boston for identifying different strata in the Black middle class—independent, dependent, and conservative.<sup>395</sup>

At the “center” of the Black political life, the dependent strata, while maintaining social ties and identification with the aspirations of the Black masses are also obligated to “pacify the anxieties of white society” from which it draws political and financial support. This tension creates vacillation in the dependent strata relative to militant collective action.<sup>396</sup>

SNCC and CORE took the militant path. The NAACP, the Urban League, and to a lesser degree SCLC,<sup>397</sup> pursued coalition politics. There was evidence of the divide early on. SNCC and CORE were often seen as troublemakers by the Kennedy Administration.<sup>398</sup> Contrasting

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attention to work in the South. Within a year the Scottsboro case became a critical focus of that work.” *Id.* at 210. The ANLC particularly aimed to build “a militant mass Negro organization” with a working class leadership. *Id.* at 209. The strategic disagreement is made plain in the ANLC “Call to Action” explaining why middle class leadership of organizations intent on mainstream coalition building was not to be trusted. *Id.*

These leaders (property owners, landlords, real estate agents, preachers, prostitute college professors, editors of middle-class magazines and newspapers, heads of various “advancement” and “improvement” associations) have a stake in the system under which the masses of Negroes are oppressed and exploited. They are therefore not in favor of its abolition, but merely seek a fuller share in the exploitation of their own people and a higher social status for their own class. Moreover they are incapable of leading the struggle because they have neither a clear understanding of the nature of the struggle (which is essentially a class struggle, and not as they pretend, a purely racial struggle) nor the courage to prosecute it militantly enough to insure success.

*Id.* at 210.

<sup>394</sup> Umoja, *The Ballot and the Bullet*, *supra* note 366, at 560.

<sup>395</sup> *Id.* at 567 (citing THOMAS D. BOSTON, RACE CLASS AND CONSERVATISM 43–46 (1988)).

<sup>396</sup> *Id.* at 567–68 (citing BOSTON, *supra* note 395, at 43–46 (internal citations omitted)).

<sup>397</sup> SCLC diverged with King’s denunciation of the Vietnam War and declined as a force after his assassination. *Id.* at 563.

<sup>398</sup> *Id.* at 568.

SNCC and Core leadership did not enjoy amicable relations with Washington. In fact, SNCC and Core were often seen as troublemakers by the executive branch during this period. According to King’s biographer . . . John F. Kennedy was

philosophies also were evident in the responses to Lyndon Johnson's request for suspension of demonstrations during the 1964 presidential elections.<sup>399</sup> The NAACP, SCLC and the Urban League "all agreed to honor President Johnson's requested moratorium to support his reelection efforts."<sup>400</sup> SNCC and CORE refused.<sup>401</sup>

"By 1966 both [SNCC and CORE] had endorsed armed self-defense as a legitimate and viable tactic in the struggle to achieve civil and human rights."<sup>402</sup> That strategy, by most accounts, was a failure and the radical organizations declined and withered.<sup>403</sup> In contrast, the conservative/integrationist groups continued to reject political violence in favor of coalition politics.<sup>404</sup>

The response to Black radicalism and political violence of the 1960's confirmed the assessment of generations of Black leaders that political violence would lead to white backlash.<sup>405</sup> The strategic dichotomy was muddled as Black radicals invoked "self-defense" as a rationale for overt political violence.<sup>406</sup>

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pleased that SCLC rather than SNCC was leading the 1963 desegregation campaign in Birmingham . . . quot[ing] Kennedy as saying 'SNCC has got an investment in violence. . . . They're sons of bitches.

*Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* at 558.

<sup>403</sup> See generally MICHAEL LEVINE, *AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT 198-208* (1996). SNCC became overtly racially exclusive during the 1966 Atlanta project. SNCC Leaders Stokely Carmichael and H. Rap Brown became more widely known in the Black power movement. Umoja, *The Ballot and the Bullet*, *supra* note 366, at 558. Attempting to encourage more expedient action on the part of the federal government after the Meredith March, King warned "I'm trying desperately to keep the movement nonviolent, but I can't keep it nonviolent by myself." *Id.* at 563. CORE, a formally interracial organization founded on Gandian principles of nonviolence, transformed into an almost entirely a Black organization. "CORE's members and leadership were predominately White middle class individuals prior to the 1960's. By the summer of 1964, Core membership was predominately Black." *Id.* at 575. Today, CORE is notable as perhaps the only Black civil rights organization to align itself with gun rights organizations. CORE President Roy Innis has been a member of the board of directors of the National Rifle Association and CORE filed an amicus brief supporting Shelly Parker and Dick Heller in the landmark decision *District of Columbia v. Heller*. Brief of Amicus Curiae Congress of Racial Equality in Support of Respondent, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>404</sup> See Umoja, *The Ballot and the Bullet*, *supra* note 366, at 561 ("SCLC leaders felt it necessary to dissociate themselves from any retaliatory violence or form of self-defense by local activists and movement supporters, for Black people in general to win the public opinion battle with White segregationists. They believed that the use of force by Black people and the movement would only serve to alienate White liberal and the general White population.").

<sup>405</sup> See, e.g., MCADAM, *POLITICAL PROCESS*, *supra* note 256, at 156-60.

<sup>406</sup> For example, the Black Panther Party for Self-Defense rationalized some of their most violent self-destructive efforts by explicitly grounding them on the rules and ordinances governing self-defense. See *id.* at 207 (describing a Black Panthers press release which stated that the Party stands for

This was a tipping point in the development of the modern orthodoxy. There was a “growing disagreement within insurgent ranks over the proper goals of the movement and the most effective means of attaining them.”<sup>407</sup>

Lined up on one side were traditional integrationists who continued to eschew violence as an unacceptable or ineffective means of pursuing movement goals. Among the Big Four, SCLC and NAACP shared this position. A further distinction can be made between these two groups on the basis of the principal method used to pursue integrationist aims. With its reliance on noninstitutionalized protest techniques, SCLC can be seen as constituting the “radical” faction within the integrationist wing, while the NAACP, on the basis of its continued emphasis on institutionalized forms of protest, comprised a “conservative” *integrationist* faction. Aligned in increasing opposition to the integrationists was the so-called “black power” wing of the movement, with its rejection of integration as the fundamental goal of black insurgency and its approval of violence (either in self-defense or as an offensive tactic), as an acceptable addition to the movement’s tactical arsenal. The remaining two members of the Big Four—CORE and SNCC—were in varying degrees associated with this wing of the movement.<sup>408</sup>

The spillover risk that had always plagued the strategic dichotomy was particularly acute in this context. Scholars of the Civil Rights and Black Power movements, emphasize that although “self-defense had always been a part of the movement . . . [a] shift from self-defense to proactive violence contributed to the [latter] movement’s demise.”<sup>409</sup>

While there had been scattered black opposition to the strategy of non-violence,<sup>410</sup> it was not widely covered until Malcolm X leveled harsh

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“revolutionary solidarity with all people fighting against the forces of imperialism, capitalism, racism and fascism”).

<sup>407</sup> *Id.* at 183.

<sup>408</sup> *Id.* at 184 (emphasis added).

<sup>409</sup> Yohuru Williams, Book Review, J.S. HIST. Vol. LXXII, No. 2, at 518, 519 (2006) (reviewing CHRISTOPHER B. STRAIN, *PURE FIRE: SELF-DEFENSE AS ACTIVISM IN THE CIVIL RIGHTS ERA* (2005)); see also MCADAM, *POLITICAL PROCESS*, *supra* note 256, at 208. The onset of Black power produced sharp birth pangs for its principal advocates. Both CORE and SNCC were reduced to serious financial straits as white sympathizers deserted in droves. This is not the unanimous view. Christopher Strain argues that “the personal and largely apolitical issue of self-defense morphed into a highly public and political issue for black Americans in the 1960’s . . . that *any* assertion of self, or self-protection, by black Americans represented a blow against racism and bigotry . . . even though it was often an individual act of defiance, free from formal coordination, collective action or overtly political aims.” STRAIN, *supra* note 148, at 6–7.

<sup>410</sup> Early on, the Black nationalist press questioned the utility of the nonviolent strategy and some criticisms equated nonviolence with cowardice. Wendt, *Protection or Path*, *supra* note 218, at 325.

public criticisms of Martin Luther King.<sup>411</sup> Even Malcolm's incendiary advocacy paid lip service to the strategic dichotomy. He pressed the self-defense point, arguing that Blacks are "peaceful people" except in response to aggressors. He explicitly invoked the Second Amendment and claimed a fundamental and constitutional right to self-defense against criminal attack. But in a final flourish Malcolm plunged fully into advocacy of political violence. "The biggest criminal against whom Blacks need to defend themselves", he claimed was the state, "Uncle Sam."<sup>412</sup>

Militant advocacy of political violence raised the difficulty and costs of defending the strategic dichotomy and diminished its effectiveness.<sup>413</sup> The influence of the radicals and the problem they posed for conservative/integrationist support of the strategic dichotomy is illustrated by the shift of Black activists in Cleveland from nonviolent protests of *de facto* school segregation, to creation of the Medgar Evers Rifle Club Community Self-Defense Organization.<sup>414</sup>

In contrast to Southern protective squads, the Medgar Evers Rifle Club was not a response to overt racist threats and served no evident "protective purpose."<sup>415</sup> Such a group could not be justified on the foundation of traditional self-defense that the leadership had recognized and accommodated through the strategic dichotomy. Now, the preparation for violence spilled over into a less defined setting and could be construed as threatening political violence.

Simon Wendt's assessment of the Black Power movement underscores the point. Advocacy of political violence "fostered violent race riots, betrayed the integrationist and nonviolent vision of earlier activism" and

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Also it is evident that nonviolence (like any opposition to racism) was not cost free. In the summer of 1956, one official of the White Citizen's Council in Alabama explained the growth of his organization: "The bus boycott made us . . . Before the niggers stopped riding the buses, we had only 800 members. Now we have 13,000 to 14,000 in Montgomery alone." THOMAS R. BROOKS, WALLS COME TUMBLING DOWN: A HISTORY OF THE CIVIL RIGHTS MOVEMENT 1940-1970, at 116 (1974).

<sup>411</sup> Wendt, *Protection or Path*, *supra* note 218, at 325. It is difficult to know all of the reasons that moved Black radicals to the seemingly suicidal strategy of political violence. Frustration, hubris, and desperation may have all played a role. In many ways, radical advocacy of political violence was a strategy of talk loudly and carry a small stick. However, a 1963 Brink and Harris Survey produced an interesting response to the question: "Some people have said that since there are ten whites for every Negro in America, if it came to white against Negro, the Negroes would lose. Do you agree with this or disagree?" Only two in ten Blacks agreed. WILLIAM BRINK & LOUIS HARRIS, THE NEGRO REVOLUTION IN AMERICA 74 (1963).

<sup>412</sup> Antihostile, MALCOLM X ON THE SECOND AMENDMENT (Harlem, 1964), YOUTUBE (Apr. 9, 2007), <http://www.youtube.com/watch?v=Cz3isgUZe5Y>.

<sup>413</sup> Wendt, *Protection or Path*, *supra* note 218, at 328. After his split with the Nation of Islam, Malcolm X founded the secular Organization of Afro-American Unity, which advocated the creation of Black controlled educational, cultural, economic, and political institutions and active armed resistance to white violence. *Id.* at 325.

<sup>414</sup> *Id.* at 326.

<sup>415</sup> *Id.*

was a strategic failure.<sup>416</sup> Initially designated “The Black Panther Party for Self-Defense” the Panthers pushed political violence under the umbrella of self-defense.<sup>417</sup> For them, self-defense included “strategic choices and carefully posed challenges to the so-called legitimate forms of state violence that had become all too regularly used within Black communities.”<sup>418</sup> The Panthers flouted the traditional distinction between self-defense and political violence and the consequences confirmed the fears of generations of Black leaders.

The Black Panther Party was decimated by federal, state, and local response to its open campaign of political violence. Direct confrontations with the state lead to incarceration and deaths of party members.<sup>419</sup> Confirming the long-standing assessment, Huey Newton later acknowledged in his memoirs that political violence was counterproductive and brought the Panthers an unwinnable war with the state that destroyed their white support.<sup>420</sup>

Splinter groups like the Black Liberation Party were even more overt advocates and practitioners of political violence under the banner of self-defense. The BLA’s avowed strategy included preemptive strikes against police.<sup>421</sup> The official response was predictable.<sup>422</sup> The trajectory of these

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<sup>416</sup> *Id.* at 320.

<sup>417</sup> *Id.* at 328–29.

<sup>418</sup> *Id.* at 326.

<sup>419</sup> *Id.* at 327.

<sup>420</sup> *Id.* at 328.

<sup>421</sup> MARYLAND STATE POLICE: CRIMINAL INTELLIGENCE DIVISION, *THE BLACK LIBERATION ARMY: UNDERSTANDING—MONITORING—CONTROLLING* 4 (1991). A core conviction of the BLA was to take control of the community by killing police (both Black and white). *Id.* at 4, 12. The BLA claimed credit for the murder of at least two policemen at a Harlem housing project and the attempted murder of two others who were guarding the home of a lawyer who was prosecuting a case against the BPP. KENNETH O’REILLY, “RACIAL MATTERS”: THE FBI’S SECRET FILE ON BLACK AMERICA, 1960–1972, at 321 (1989). Assata Shakur (JoAnne Chesimard) provides an illuminating account. Senit Rahel Debesai, *Assata Olugbala Shakur*, UNIV. MINN. (May 23, 2001), [http://voices.cla.umn.edu/artistpages/shakur\\_assata.php](http://voices.cla.umn.edu/artistpages/shakur_assata.php). Shakur was convicted of murdering a State trooper, then sprung from jail by members of the BLA. *Id.* She then fled to Cuba where she wrote an autobiography that offers an insider’s account of the BPP and BLA. *Id.* See generally ASSATA SHAKUR, *ASSATA: AN AUTOBIOGRAPHY* (1987). Shakur’s assessment highlights the divide between the strategy of radical resistance and coalition building. See ASSATA, *supra*, at 227 (“One day, in the not too distant future, any Black organization that is not based on bootlicking and tomming will be forced underground.”). John Castellucci offers a less sympathetic view of the BLA and similar organizations, stating frankly that the “BLA went underground to kill cops.” JOHN CASTELLUCCI, *THE BIG DANCE: THE UNTOLD STORY OF KATHY BOUDIN AND THE TERRORIST FAMILY THAT COMMITTED THE BRINK’S ROBBERY MURDERS* 134 (1986).

<sup>422</sup> There is an interesting parallel between the Black radical movements of this period and the radical left. Laura Browder details the advocacy of armed political violence by various radical leftist groups with a focus on radical women of the 1960s and 1970s. See LAURA BROWDER, *HER BEST SHOT: WOMEN AND GUNS IN AMERICA* 136–37 (2006) (recounting the focus on tracing women’s use of guns in the 1960s and 1970s as a means of placing themselves within an American tradition). Her treatment of “Armed Women of the Far Right” reflects a similar self-destructive advocacy of political

groups confirmed the futility of Black political violence.

In what Doug McAdam marks as a contraction of political opportunities, the period 1966–1970 is crucial in the development of the modern orthodoxy.<sup>423</sup> Radical organizations were in decline.<sup>424</sup> In the North, urban riots marked a sort of failure of the civil rights leadership to connect to the energy that fueled the violence. This failure to connect made the surviving organizations even more dependent on external (white progressive) sources of funding and support.<sup>425</sup> Urban rioting diminished Black political capital, prompted white backlash, and pressed the Blacks more firmly into the camp of progressive allies.<sup>426</sup>

In this environment, it was practically and conceptually difficult and tactically wasteful to expend the political capital necessary to sustain the strategic dichotomy. When Black radicals flouted the strategic dichotomy, the crucial question was whether more conservative organizations would step in to defend it. This was an entirely new dynamic. The incentives and opportunities to deploy the strategic dichotomy on behalf of a competing group within the movement were minimal with dubious promise of payoff. The radicals had sullied the strategic dichotomy with claims of equivalence between political violence and self-defense. Increasing efforts by conservatives/integrationists to sustain the dichotomy threatened to inflame progressives and seemed less relevant to the floundering northern movement.

There was an early marker of this in 1966. On August 21, representatives from along spectrum of Black leadership appeared on the nationally syndicated political talk show, *Meet the Press*, to address Civil Rights.<sup>427</sup> It was a pivotal and high profile airing of the strategic dichotomy.

Opposing the radical implications of “Black Power” were Martin Luther King of SCLC, Roy Wilkins of the NAACP and Whitney Young of the Urban League.<sup>428</sup> Defending it were James Meredith, Stokely Carmichael of SNCC and Floyd McKissick of CORE.<sup>429</sup> Carmichael had deployed the phrase “Black Power” in June of 1966 in a Greenwood,

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violence. *See id.* at 186–87 (discussing armed female activists of the far right and the effect of using their sexual attention to attract male recruits).

<sup>423</sup> MCADAM, *POLITICAL PROCESS*, *supra* note 256, at 201–02.

<sup>424</sup> *Id.* at 191.

<sup>425</sup> *Id.* at 208–10.

<sup>426</sup> *See id.* at 194 (explaining how the “rac[e] issue tended to polarize the various components of [the Democrats’] traditional urban coalition” and how the “white ethnics abandoned the party in droves”); *see also* LEVINE, *supra* note 403, at 204 (stating that Blacks lost political allies as a result of “white backlash”).

<sup>427</sup> *Meet the Press* (transcript of NBC television broadcast Aug. 21, 1966), at 1, 2, *available at* <http://www.thekingcenter.org/archive/document/meet-press#>.

<sup>428</sup> *Id.* at 2–3.

<sup>429</sup> *Id.* at 3–4.

Mississippi speech, initiating the resumption of the Mississippi March Against Fear.<sup>430</sup>

The questioning acknowledged the traditional insistence upon a distinction between self-defense and political violence. Host Lawrence Spivak's question to Floyd McKissick, the new Director of CORE, reflects this mainstream acknowledgement of the strategic dichotomy: "There is a difference between self-defense and non-violence. . . . Everybody believes in self-defense. . . . Am I to understand then that you and Dr. Martin Luther King really are not in disagreement on the principle and the philosophy of nonviolence?"<sup>431</sup>

McKissick responded that "self-defense and nonviolence are not incompatible," but equivocated on whether he agreed with King about the precise boundary between self-defense and political violence.<sup>432</sup>

Unable to draw a direct answer from McKissick, the panel put the question to King.<sup>433</sup> King's cautious response reflected the circumstances. Contrast King's earlier characterization of self-defense in the Robert Williams controversy as "moral," "legal," and perhaps earning blacks support for the "courage and self-respect it reflects".<sup>434</sup> Now, in the shadow of radical invocations of Black Power, King offered a barely recognizable rendition of the strategic dichotomy that showed an obvious concern about statements or actions that would prompt political violence:

I believe firmly in nonviolence. . . . I think a turn to violence on the part of the Negro at this time would be both impractical and immoral. Now, if Mr. McKissick believes in that, I certainly agree with him. Now, on the question of defensive violence, I have made it clear that I don't think we need programmatic action around defensive violence. People are going to defend themselves anyway. I think the minute you have programmatic action around defensive violence and pronouncements about it, the line of demarcation between defensive violence and aggressive violence becomes very thin. The minute the nomenclature of violence gets into the atmosphere, people begin to respond violently and in their unsophisticated minds they cannot quite make the distinction between defensive and aggressive violence.<sup>435</sup>

Spivak pressed the self-defense/political violence boundary again in an

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<sup>430</sup> WENDT, SELF-DEFENSE, *supra* note 121, at 131.

<sup>431</sup> *Meet the Press*, *supra* note 427, at 20–21.

<sup>432</sup> *Id.* at 22.

<sup>433</sup> *Id.*

<sup>434</sup> MARTIN LUTHER KING, JR., 5 *The Social Organization of Nonviolence*, in THE PAPERS OF MARTIN LUTHER KING, JR. 299, 302 (2005).

<sup>435</sup> *Meet the Press*, *supra* note 427, at 22.



exchange with James Meredith. The result was a raw and open endorsement of political violence that defied the distinctions Blacks traditionally had worked to sustain through the strategic dichotomy. Referencing Meredith's criticisms of King's nonviolent approach, Spivak asked,

Mr. Meredith, don't you think we ought to get straight on the difference between nonviolence and self-defense? . . . I think when Dr. King and others speak about nonviolence they say that groups of negroes shouldn't take [arms] . . . I don't think that there are many of us who don't believe in the right of self-defense of [any] Negro against anyone who attacks him. . . . When we talk about nonviolence, we are saying that the Negro ought not in groups or alone take up a gun . . . in order to take what he believes belongs to him.<sup>436</sup>

Meredith's response was devastating to the long and careful efforts to maintain the strategic dichotomy, rendering it an awkward tool with dubious political utility:

MR. MERIDITH: [T]he Negro has never entertained the idea of taking up arms against the whites . . . . But now I think the Negro must become part of this mainstream and if the whites—now you take Mississippi, for instance—now I know the people that shot in my home years ago. They know the people that killed all of the Negroes that have been killed. . . . [T]he Negro has no choice but to remove these men and they have to be removed.

MR. SPIVAK: Are you suggesting then that if several Negroes are killed or any white men are killed and the law does not punish them, as happens very often in the case of white men too, that people ought to organize a[s] vigilante[s] and go out and take the law into their own hands and commit violence? You are not saying that, are you, Mr. Meredith?

MR. MERIDITH: That is exactly what I am saying. Exactly

MR. CARMICHAEL: If those won't do it, who is going to do it?

MR. SPIVAK: Mr. Meredith, do you mean to tell me that you believe the Negroes in this country ought to organize, take up guns . . . .

MR. MERIDITH: This is precisely, and I will tell you why,

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<sup>436</sup> *Id.* at 43–44.

because the white supremacy is a system—

MR. SPIVAK: Well, Mr. Meredith, this doesn't even make sense against 180 million people. If you do it they are going to do it.

MR. ROWAN: Mr. Carmichael, do I detect that you agree with Mr. Meredith that the Negro may have to take up arms?

MR. CARMICHAEL: I agree 150 percent that black people have to move to the position where they organize themselves and they are in fact a protection for each other. . . . [I]f in fact 180 million people just think they are going to turn on us and we are going to sit there, like the Nazis did to the Jews, they are wrong. We are going to go down together, all of us.

MR. EVANS: Mr. Wilkins, I want to ask you, . . . about [Carmichael's] last statement, do you think it serves the Negro or the white man, his purpose in any way, to threaten that the ten percent of the Negro population can, if it has to, drag down this whole country?

MR. WILKINS: I think Mr. Carmichael is—if he weren't where he is, he ought to be on Madison Avenue. He is a public relations man par excellence. He abounds in the provocative phrase. Of course, no one believes that the Negro minority in this country is going to take up arms and try to rectify every wrong that has been done the Negro race if somebody doesn't rectify it through the regular channels.<sup>437</sup>

It is easy to understand how in this environment the leadership would become more circumspect in deploying the strategic dichotomy and about its general approach to the question of black violence, even in self-defense. With subtle distinctions harder to sustain, prudence demanded strong condemnation of the dangerous advocacy of political violence as self-defense being advanced by the black power movement.

For Wilkins, some have argued that the approach was tactical; that donations to the NAACP quadrupled in the period 1966–1968 when the organization was vigorously opposing the radical concept of “black power.”<sup>438</sup> Whatever the motivation, Wilkins plainly opposed the aggressive, radical rendition of the strategic dichotomy.

Still, in other venues, Wilkins continued rhetorical support of a careful, conservative version. In his keynote address at the 1966 NAACP

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<sup>437</sup> *Id.* at 44–47, 53.

<sup>438</sup> *Id.* at 145 (“Almost quadrupling its income between 1966 and 1968, the NAACP undoubtedly benefited from its adamant opposition to the new slogan.”).

convention, Wilkins criticized the radical turn of SNCC, directly deployed a traditional, conservative rendition of the strategic dichotomy, and repudiated the radical aggressive rendition (first addressing SNCC's new public endorsement of self-defense and then repudiating the new black power movement):

One organization [SNCC] which has been meeting in Baltimore has passed a resolution declaring for defense of themselves by Negro citizens if they are attacked. This is not new as far as the NAACP is concerned. Historically our Association has defended in court those persons who have defended themselves and their homes with firearms. . . . But the more serious division in the civil rights movement is the one posed by a word formulation that implies clearly a difference in goals. No matter how endlessly they try to explain it, the term "black power" means anti-white power. . . . It has to mean separatism. . . . It is a reverse Mississippi, a reverse Hitler, a reverse Ku Klux Klan. . . . We of the NAACP will have none of this.<sup>439</sup>

This was an important moment of converging trends. While the militant strategy of "political violence as self-defense" was proving a failure, coalition politics and the conservative strategy of institutional change were paying off:

In marked contrast to the withdrawal of external support experienced by SCLC, SNCC, and CORE, the NAACP enjoyed a steep and steady rise during this period in its level of outside funding. . . . [T]he NAACP came to be seen by external support groups as virtually the only "acceptable" funding option available. . . . In response, first to the substantive radicalization of SNCC and CORE, and later to King's antiwar stance, many groups that had earlier contributed to one of these three organizations shifted their support to the NAACP. . . . By the end of the [1960s], this dramatic redistribution of external support had helped to reduce the once formidable Big Four to a single strong movement organization.<sup>440</sup>

Important institutional changes were also unfolding. President Lyndon

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<sup>439</sup> Roy Wilkins, *Whither "Black Power"?*, CRISIS, Aug.-Sept. 1966, at 353, 353-54; *see also* WENDT, SELF-DEFENSE, *supra* note 121, at 141 (discussing CORE's 1966 resolution embracing self-defense by deleting the organizations requirements that members "adopt the technique of non-violence in direct action").

<sup>440</sup> MCADAM, POLITICAL PROCESS, *supra* note 256, at 213.

Johnson advanced the War on Poverty with spoils to the Black underclass.<sup>441</sup> He pressed for and signed landmark civil rights legislation<sup>442</sup> and appointed former NAACP Chief Counsel Thurgood Marshall as the first Black to the post of Solicitor General and then to the United Supreme Court.<sup>443</sup> Concurrently, Johnson pressed for and signed the Gun Control Act of 1968,<sup>444</sup> lamenting that it was a “watered-down” version of what he had proposed.<sup>445</sup>

The themes intersect in Johnson’s nomination of Marshall to the Supreme Court. In preparation for Marshall’s confirmation hearings, Johnson “put him on a national commission to study crime and violence in American cities. The idea was to keep Marshall’s name in the news as a sober, rational voice able to respond to black militants.”<sup>446</sup> Throughout the

<sup>441</sup> LEVINE, *supra* note 403, at 194.

<sup>442</sup> *See id.* at 192 (discussing the Civil Rights Act of 1964 and the Voting Rights Act of 1965).

<sup>443</sup> David Coleman & Keri Matthews, *Thurgood Marshall & LBJ: From the Johnson Tapes*, MILLERCENTER.ORG, <http://millercenter.org/presidentialclassroom/exhibits/thurgood-marshall-lbj-johnson-tapes?ModPagespeed=noscript> (last visited Feb. 28, 2013); *see also* *Thurgood Marshall*, U.S. DEP’T OF JUST., <http://www.justice.gov/osg/aboutosg/osghistpage.php?id=32> (last visited Feb. 23, 2013) (providing a biography of Marshall).

<sup>444</sup> Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968).

<sup>445</sup> Letter to the President of the Senate and to the Speaker of the House Urging Passage of an Effective Gun Control Law, 1 PUB. PAPERS 694, 694–95 (June 6, 1968); *see also* David T. Hardy, *The Firearms Owners’ Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 597 (1986) (examining how “the Johnson Administration advocated stricter firearms control with increasing vigor”). The Johnson administration pressed Senator Dodd, who introduced the bill as S. 1, to push more aggressively on moving the bill through the senate. Hardy, *supra*, at 597. In his 1968 State of the Union Address, Johnson called on Congress “to stop the trade in mail-order murder, to stop it this year by adopting a proper gun control law.” Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 25, 30 (Jan. 17, 1968). After the 1968 GCA was enacted, Johnson criticized it as “a watered down version of the Gun Control Law [he] recommended.” 1 PUB. PAPERS 14, 694 (1970). A competing bill offered by others as S. 917 and amendments to Dodd’s bill were explicitly described as being submitted on behalf of the Johnson administration. 113 CONG. REC. 2902, 3255.

One of the first signals of the rise of the modern orthodoxy occurs around this time in the form of Roy Wilkins’s apparent allusion in 1967 to the ongoing work driving the Gun Control Act of 1968. In questioning that reflects Robert Sherrill’s criticism that the Act was driven by a desire to control black violence, *see* ROBERT SHERRILL, *THE SATURDAY NIGHT SPECIAL* 280, 282–83 (1973), Wilkins was asked by Robert Novak, “Would you be in favor of a massive effort to disarm the Negroes in the ghettos, just to try to prevent these open-shooting wars such as occurred in Newark last night?” *Meet the Press*, *supra* note 427, at 9. Wilkins’s principle response was a standard rendition of the strategic dichotomy: “I wouldn’t disarm the Negroes and leave them helpless prey to the people who wanted to go in and shoot them up. . . . Every American wants to own a rifle. Why shouldn’t the Negroes own rifles.” *Id.* But this response came after Novak pressed him about gun prohibition targeted specifically at Blacks. His first parry, seemingly consistent with the views driving Johnson’s advocacy of new federal gun controls, suggested a nascent support for the program of gun regulation that had been stirring in progressive circles: “I would be in favor of disarming everybody, not just the Negroes.” *Id.* It is unclear whether Wilkins was referring to nationwide disarmament or disarming everyone in riot torn cities. Either way, the statement seems in tension with his many pronouncements in support of armed self-defense and is an early signal of potential support in the Black leadership for stringent gun control.

<sup>446</sup> JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 334 (1998).

1960s and into the 1970s as Blacks registered to vote in greater numbers, more Black representatives were elected to legislatures.<sup>447</sup> Blacks gained increasingly influential positions in the executive branch and Black administrations came to power in various cities.<sup>448</sup>

This prevailing Black establishment faced a new reality. A product of successful coalition politics and beneficiary of legislation forged by progressive alliances, it disconnected from the tradition of Black self-defense that itself was now sullied by the radicals' blurring of the boundary between private self-defense and political violence. With access to new levels of power, the Black establishment now could plausibly view the historic reasons for distrust of the state as having disappeared with their own ascendancy to power.<sup>449</sup>

This was precisely the time that the national gun control movement emerged and was quickly ensconced in the progressive coalition.<sup>450</sup> With cities burning and black radicals preaching violent revolution,<sup>451</sup> politicians and editorialists called for stricter gun legislation as a way to disarm the

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<sup>447</sup> LEVINE, *supra* note 403, at 192–93.

<sup>448</sup> *Id.* at 193–94, 211, 234. The new crop of Black mayors included: Richard Hatcher of Gary, Indiana (in 1967); Kenneth Gibson of Newark, New Jersey (in 1970); Thomas Bradley of Los Angeles, California (in 1973); Maynard Jackson of Atlanta, Georgia (in 1973); Coleman Young of Detroit, Michigan (in 1973); Ernest R. Morial of New Orleans, Louisiana (in 1977); and Richard Arrington of Birmingham, Alabama (in 1979). *Id.* at 234. For summaries of Black advances in Congress, as well as in state and local political offices, see *id.* at 193, 222, 234–35. See also *Progress Report 1967: Political Victories Climax Year of Strife and Explosion in Nation's Black Ghettos*, EBONY, Jan. 1968, at 118, 120–22 (highlighting 1967 African American achievements made inside and out of government).

<sup>449</sup> This marked a shifting of establishment priorities more than an empirically verifiable change in conditions. Racist violence against and by Blacks continues to this day and puts innocents at risk in ways that the state cannot prevent. See generally *Hate Map*, S. POVERTY L. CTR., <http://www.splcenter.org/get-informed/hate-map> (last visited Feb. 23, 2013) (displaying geographically “1,018 active hate groups” identified in 2011 that “have beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics”).

<sup>450</sup> See, e.g., Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 773–74 (2005) (arguing that after the Gun Control Act of 1968, “a plausible organized resistance to the right to keep and bear arms splashed onto the scene,” leading to the formation of the National Council to Control Handguns and the Coalition to Ban Handguns). While National organizations explicitly advocating gun prohibition emerged only in the 1970s, gun control proposals were by no means a new phenomenon. See, e.g., NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 251–52 (2012) (highlighting gun control restrictions passed prior to the Civil War); see also ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 207–11 (2011) (describing the collaboration in the first half of the twentieth century between the NRA and prominent gun control advocates to develop legislation such as the Revolver Act and the National Firearms Act). Of course, those gun control efforts were seeking to prevent untrustworthy people from getting guns, not to ban guns for everyone.

<sup>451</sup> See, e.g., ALEXANDER DECONDE, GUN VIOLENCE IN AMERICA: THE STRUGGLE FOR CONTROL 176–77 (2001) (discussing the 1965 race riot in California and how it was described as “guerrilla warfare, an uprising, or a revolt”).

ghettos.<sup>452</sup> Black mayors, local state and national representatives and appointees—having gained power, now facing the burden of exercising it—embraced the progressive program of supply side gun control as an answer to the crime and unrest afflicting their new domains.

From there, the modern orthodoxy took hold and flourished as supply-side gun control became an article of faith for progressives. By 1976, for example, Maynard Jackson, the first black mayor of Atlanta,<sup>453</sup> serving as the Chairman of the National Coalition to Ban Handguns, urged that, “[t]he United States should move immediately to ban the import, manufacture, sale and possession of all handguns . . . .”<sup>454</sup> Today, the worry that this demands a level of trust in government that is incompatible with the Black experience, practice, and policy is answered with the assertion that *things have changed*.<sup>455</sup> The next section will critique the view that changed circumstances validate the modern orthodoxy.

#### B. Answering the Twenty-First Century Objection

One might agree that there is a strong tradition of armed self-defense in the Black community and still reason that the modern orthodoxy is justified on the view that “things have changed.” There is no dispute that Black-on-Black crime by desperate young men in poor urban communities is a scourge that prompts many to embrace the promise of supply-side gun control. This view is pressed in detail by Michael de Leeuw, author of the NAACP’s Amicus Brief supporting the District’s gun ban<sup>456</sup> in *District of Columbia v. Heller*.<sup>457</sup> His essay in the *Harvard Blackletter Law Journal* defends and carries forward the modern orthodoxy, arguing that in urban districts with Black administrations, stringent supply-side gun laws should be upheld as an exercise of community autonomy and that support for such exceptions to the right to keep and bear arms should be an essential part of the modern civil rights agenda.<sup>458</sup> This is a more race-driven rendition of Justice Breyer’s *Heller* dissent, which would permit local governments to

<sup>452</sup> SHERRILL, *supra* note 445, at 283–90.

<sup>453</sup> David M. Halbfinger, *Maynard H. Jackson Jr., First Black Mayor of Atlanta and a Political Force, Dies at 65*, N.Y. TIMES, June 24, 2003, at A29.

<sup>454</sup> Maynard Holbrook Jackson, Jr., *Handgun Control: Constitutional and Critically Needed*, 8 N.C. CENT. L.J. 189, 189 (1977). “In [1989], the National Coalition to Ban Handguns changed its name to the Coalition to Stop Gun Violence to reflect its view that assault rifles, as well as handguns, should be outlawed.” KRISTIN A. GOSS, *DISARMED: THE MISSING MOVEMENT FOR GUN CONTROL IN AMERICA* 112 (2006). The National Urban League continues as a member of the Coalition. *Member Organizations*, COAL. TO STOP GUN VIOLENCE, <http://www.csgv.org/about-us/member-organizations> (last visited Feb. 23, 2013).

<sup>455</sup> See *infra* note 469 (discussing de Leeuw et al.).

<sup>456</sup> Brief of Amicus Curiae the NAACP Legal Defense & Educational Fund, Inc. in Support of Petitioners at 25–29, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

<sup>457</sup> 554 U.S. 570 (2008).

<sup>458</sup> de Leeuw et al., *supra* note 11, at 136–37.

impose more stringent limits on generally available firearms or outright *de jure* bans in certain communities.<sup>459</sup>

There is, however, a mistake of focus in the objection that ‘things have changed.’<sup>460</sup> Even if it is true that Blacks no longer have to worry about racist violence<sup>461</sup> and malevolent governments (or more contestably their agents),<sup>462</sup> the objection ignores that the Black self-defense tradition is

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<sup>459</sup> *District of Columbia v. Heller*, 554 U.S. 570, 722 (2008) (Breyer, J., dissenting). The impulse to exalt the role of benevolent governments in this context is an understandable counterpoint to the historic treatment of Black-on-Black crime as a non-issue by racist state and local governments. See, e.g., POWDERMAKER, *supra* note 25, at 169–74 (1939) (arguing that malevolent and neglectful governments forced Blacks to settle their own intra-group difficulties using violence that might have been avoided by the imposition of the rule of law by a benign administrator).

<sup>460</sup> The “things have changed” argument also might dictate a change in views about the death penalty and prisoners’ rights. If Black administrations and Black police are now locking up Black criminals that prey on Black victims, why should Blacks continue to worry about rights of the accused in the same way we worried through most of our history (where the state was notorious for misidentifying, viciously interrogating, mistreating and Black suspects and offenders)? The answer is that the problems continue and have not been erased simply by the election of Black mayors; the same is true for armed self-defense.

Finally, the leap from Black electoral success to the assumption that poor Black communities should trust the Black security apparatus is a perilous one. The dynamic between police culture and minority communities is a complicated one that is beyond the scope of this Article. But that complexity is manifested in the ample evidence that Black mayors does not automatically equal harmonious police-community relations. The recent indictment of New Orleans Police officers for assault and murder of Blacks following Hurricane Katrina is a prime illustration of this. See Trymaine Lee, *Inquiries Give Credence to Reports of Racial Violence After Katrina*, N.Y. TIMES, Aug. 27, 2010, at A9 (“Several police officers and a white civilian accused of racially motivated violence have recently been indicted [and convicted] in various cases, and more incidents are coming to light as the Justice Department has started several investigations into civil rights violations after the storm.”). There, at least one of the officers was Black. See Jarvis DeBerry, *Black New Orleans Police Officers Help Maintain Blue Wall of Silence*, TIMES-PICAYUNE (May 27, 2012), [http://www.nola.com/opinions/index.ssf/2012/05/black\\_new\\_orleans\\_police\\_offic.html](http://www.nola.com/opinions/index.ssf/2012/05/black_new_orleans_police_offic.html) (“Robert Faulcon, a black officer convicted in the Danziger Bridge case, got the longest sentence given to an officer for Katrina-related crimes.”). While this alone is not an argument for civilian armament, it undercuts trust in the collective security apparatus, which is an important component of the gun control movement’s most aggressive anti-self-defense views.

<sup>461</sup> This, however, is contestable, as evidenced by the Southern Poverty Law Center, which tracks modern episodes and groups that advocate racist violence. See *What We Do*, S. POVERTY L. CTR., <http://www.splcenter.org/get-involved/what-we-do> (last visited Mar. 4, 2013) (“We track the activities of hate groups and domestic terrorists across America, and we launch innovative lawsuits that seek to destroy networks of radical extremists.”).

<sup>462</sup> This, too, is contestable. See, e.g., Victoria Cherrie, *NAACP Wants SBI to Look at Shootings*, CHARLOTTE OBSERVER (June 13, 2008), <http://www.charlotteobserver.com/2008/06/13/45145/naACP-wants-sbi-to-look-at-shootings.html> (describing the NAACP of North Carolina’s effort to enact state legislation in response to police-involved shootings); Charles Ellison, *Tensions Persist in Portland Since Fatal Police Shooting of Unarmed Man*, POLITIC365 (Sept. 6, 2010), <http://politic365.com/2010/09/06/tensions-persist-in-portland-since-fatal-police-shooting-of-unarmed-Black-man/> (noting local anger over perceptions of chronic police brutality in Portland, Oregon).

[M]any people in Portland are perplexed that large segments of Portland’s African American community see the shooting death of Aaron Campbell through a racial lens. A white Portland police officer shot Campbell, an unarmed black man, in the back during a confrontation at an apartment building. Police and city leaders have

fundamentally a response to the *failure and limitations* of government.<sup>463</sup> It is true that the Black self-defense tradition emerged in a context where much of the *reason* for this failure was overt hostility and official neglect. But it is a mistake to presume that the *reason* for failure of government is pivotal. From the perspective of people at risk, the *reason* is secondary. The central thing is that they face a physical threat within a window of state failure.<sup>464</sup> The reasons for the state's failure to protect these people

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come under intense criticism for confusion at the scene. But Ingram and other African Americans who live here say the Campbell shooting cannot be seen as a singular incident: It confirms a deep-seated distrust of police and a fear that interaction with them has the potential to turn violent.

Nikole Hannah-Jones, *Black Experience Propels Anger in Police Shooting of Aaron Campbell*, OREGONIAN (Feb. 19, 2010), [http://www.oregonlive.com/portland/index.ssf/2010/02/black\\_experience\\_propels\\_anger.html](http://www.oregonlive.com/portland/index.ssf/2010/02/black_experience_propels_anger.html).

Then the Homer police showed up, two white officers whose arrival caused the participants at the Black family gathering to quickly fall silent. Within moments, Monroe lay dead, shot by one of the officers as his family looked on.

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Yet the Feb. 20 Homer incident was not an isolated case. Across the nation, in four cases in recent months, white police officers have been accused of unprovoked shootings of African Americans in what civil rights leaders say are illustrations of the potentially deadly consequences of racial profiling by police. In the mostly white Houston suburb of Bellaire, a 23-year-old black man sitting in his own SUV in the driveway of his parents' home was shot and wounded on New Year's Eve by police who mistakenly believed he had stolen the vehicle. The case is under investigation. In Oakland, a transit police officer has been charged with murder for allegedly shooting an unarmed black man in the back while he was restrained and lying face down on a train platform on New Year's Day.

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The evidence is not merely anecdotal. The most recent national analysis from the Justice Department's Bureau of Justice Statistics shows that blacks and Hispanics were nearly three times as likely as whites to be searched by police—and blacks were almost four times as likely as whites to be subjected to the use of force.

Howard Witt, *Race May Be Factor in Police Shooting of Unarmed Elderly Man*, CHI. TRIB. (Mar. 13, 2009), <http://www.chicagotribune.com/news/nationworld/chi-race-shootings-webmar13,0,7686526.story>; Press Release, NAACP of N.C., Stop the Epidemic of Police Shootings of African Americans! Joint Statement on Charlotte Police Shootings (Jun. 2008), available at <http://http://carolinajustice.typepad.com/ncnaacp/2008/06/stop-the-epidem.html#more> (highlighting the series of Charlotte-area civilian shootings by police during the first five months of 2008).

<sup>463</sup> For an assessment of my past scholarly work on the topic, see Nicholas J. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL. 187, 194 (2006) ("At the instant the threat arises, government generally is just an abstraction with nothing to say about the physical matters at hand, powerless either to impair self-defense or for that matter to protect the victim."). See also Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 118 (1997) ("The state's inability to stop imminent criminal attacks justifies, and indeed compels, a right to armed self-defense to fill the gap.").

<sup>464</sup> I have previously addressed the assertion that opposition to gun control is the cause of this government failure. See Johnson, *Imagining Gun Control*, *supra* note 388, at 851 (noting that even



may have changed. But the core private interest in self-preservation within that window and the tools to facilitate it have not.

In an earlier era, Thomas Fortune urged, "in the absence of law . . . we maintain that every individual has every right . . . to . . . protect himself."<sup>465</sup> Ida B. Wells advocated armed self-defense as a response to government failure, noting the folly of trusting the government that was plainly not strong enough to protect the exercise of the ballot.<sup>466</sup> She advocated the Winchester repeating rifle on the view that even if the Federal government was not overtly hostile, it certainly was not equipped to protect Blacks from imminent threats.<sup>467</sup> In 1963, CORE workers complained to the still-pacifist national office, "[w]e cannot tell someone not to defend his property and the lives of his family . . . ."<sup>468</sup>

In 1916, W.E.B. Du Bois picked up a gun to protect his home and family. Nearly a century later, Shelly Parker was similarly besieged by thugs in her Washington D.C. neighborhood. In both cases, within a specific window, the state was no answer to the impending threat. We do not begrudge Du Bois his gun. But Shelly Parker, under the full weight of the modern orthodoxy, required intervention by the United States Supreme Court to validate her right to armed self-defense. And even now, some lament the Court's decision as a tragedy for Blacks.<sup>469</sup>

This is a curious turn of events. It is as though the complexion of the threat has changed our focus and concern entirely away from the immediate victim. This may be natural for remote observers and public officials pulled by disparate policy considerations and themes of community victimization. Indeed, it is a predictable stance for those plugged into mainstream, public institutions. But from the perspective of the immediate victim, the color of the attacker makes not one whit of difference and armed self-defense remains as important as ever.

Where government fails, the necessity of self-help continues. Black electoral success does nothing to diminish the problem of imminence that always has been the core of legitimate self-defense or the problem of finite resources that renders public response to private threats even more tenuous. The next two subsections argue that the failure and limitations of the state, in the context of imminence and finite resources require a

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when an outright prohibition of handguns in Washington D.C. overcame opposition and was instituted prior to the *Heller* decision, the city failed at reining in gun crime).

<sup>465</sup> Thornbrough, *supra* note 149, at 23.

<sup>466</sup> JACQUELINE JONES ROYSTER, IDA B. WELLS BARNETT, SOUTHERN HORRORS AND OTHER WRITINGS 70 (1997).

<sup>467</sup> *Id.*

<sup>468</sup> TYSON, *supra* note 143, at 291.

<sup>469</sup> See, e.g., de Leeuw et al., *supra* note 11, at 148 ("[T]he possibility of a loosening of firearms restrictions around the country in the wake of *Heller* should be of serious concern to civil rights activists and lawyers.").

reassessment of the modern orthodoxy.

### 1. *Government Failure Within the Window of Imminence*

Self-defense is a universal exception to the state's monopoly on legitimate violence.<sup>470</sup> Recognition of state impotence is built into the doctrine through the imminence requirement. Self-defense is justified where individuals encounter immediate threats to which government cannot respond and private violence is necessary to avoid death or serious bodily harm.<sup>471</sup> George Fletcher elaborates:

[T]he imminence requirement *expresses the limits of governmental competence*: when the danger to a protected interest is imminent and unavoidable, the legislature can no longer make reliable judgments about which of the conflicting interests should prevail. Similarly, when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary.<sup>472</sup>

State failure within the window of imminence is universal.<sup>473</sup> Given

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<sup>470</sup> See David B. Kopel et al., *The Human Right of Self-Defense*, 22 BYU J. PUB. L. 43, 178 (2007) ("No government has the legitimate authority to forbid a person from exercising her human right to defend herself against a violent attack or to forbid her from taking the steps and acquiring the tools necessary to exercise that right."). Validation of violence in self-defense is ancient. It is a component of most civilized systems of government, to the point that in the U.S. system, even the claim of the lowly slave was occasionally recognized. See Johnson, *Self-Defense?*, *supra* note 463, at 209 (describing that "in some instances, even the dehumanized slave was acknowledged to have some of the basic prerogatives inherent in all God's creatures").

<sup>471</sup> Imminence also impacts our views about the utility of handguns and storage requirements. The handgun is both portable and easily accessible, both of which are important variables in responding to imminent threats. Imminence also complicates the conversation about safe storage (storing loaded guns, utilizing trigger locks, etc.).

<sup>472</sup> George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553, 570 (1996) (emphasis added). For more analysis of self-defense by the same author, see GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (2000).

<sup>473</sup> Some may contest this on the view that the state certainly can affect the precursors of violent aggression and prohibit certain types of weapons, thus at least eliminating the violence committed with those weapons. The problem is that the supply-side controls that stem from this reasoning require reductions of the gun inventory to levels approaching zero. That is simply impossible in a country with 300 million guns, a robust gun culture, and a contested constitutional right to arms.

The implications of the imminence problem are illustrated in another way. Assume for the sake of argument that our government actually could make guns disappear. This would eliminate gun crime. It would also exacerbate the imbalance of power in favor of the young, strong, and ruthless. The gun, through its ease of use, equalizes the capacity to commit violence so that the old and weak are even with the young and strong. In a world of contact weapons however, there surely will be no gun violence, but query whether that is a better world. See, e.g., Brief for Southeastern Legal Foundation, Inc. et al. as Amici Curiae Supporting Respondents, *District of Columbia v. Heller*, 554 U.S. 570

our history, one might expect Blacks to be particularly sensitive to this failure, especially since the window of imminence is often larger in Black neighborhoods where various challenges stretch public resources. So how do we explain the shift of the modern orthodoxy away from the traditional support of self-defense? Perhaps the reason is that failure of the state is less galling today. Under slavery, Black Codes, and Jim Crow, when the state intervened, it was often a menace rather than a benefit.<sup>474</sup> Under those circumstances, reliance on the state for personal security was more obviously an absurd proposition.

Today, state failure is less pernicious and more in the nature of inherent limitations. So it is possible for those ensconced in local, state, and national bureaucracies to comfortably urge reliance on the state and ignore the continuing failure of government within the window of imminence. But if that is the explanation, then the modern orthodoxy is not really a clear-eyed policy decision to trade off the costs of imminent threats. Rather, private concerns about imminent threats are just glibly ignored because the most egregious renditions of state failure have passed.

Failure of the modern orthodoxy to engage state failure in the context of imminence is highlighted, by contrast, to the thinking about it in the context of other issues on the progressive agenda. Progressives have pressed the idea of state failure aggressively to expand the range of legitimate self-defense in other contexts and in support of reproductive rights.<sup>475</sup>

State failure is at the core of advocacy for expansion of self-defense for battered women. One school of thought would actually eliminate the imminence requirement in favor of a no “genuine alternatives” standard, wherein state failure justifies self-defense, even absent an immediate threat of death or bodily harm.<sup>476</sup> Here, state failure is urged as the justification

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(2008) (No. 07-290), 2008 WL 405570 at \*I (highlighting the Founders’ belief that without arms, the strong would invariably dominate their weaker counterparts).

<sup>474</sup> For a factual background on Black self-defense jurisprudence, see *supra* notes 18–99 and accompanying text.

<sup>475</sup> See, e.g., Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 94 (2001) (highlighting the reality that gender-specific suffering by women is often ignored within the context of our culture as a whole); Paul Butler, *By Any Means Necessary: Using Violence and Subversion to Change Unjust Law*, 50 UCLA L. REV. 721,763 (2003) (arguing that civil rights advocates view discrimination as a “malign evil” and that “[j]ust war doctrine allows a proportionate response”); Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race Gender, Class and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347, 409 (2002) (noting that the bankruptcy system redefined the relationship between the government, individuals, and their property); Mary Sigler, *Contradiction, Coherence and Guided Discretion in the Supreme Court’s Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1154 (2003) (maintaining that confusion stemming from courts’ just-punishment jurisprudence has complicated efforts to determine the constitutionality of capital punishment).

<sup>476</sup> See, e.g., Benjamin C. Zipursky, *Self-Defense, Domination and the Social Contract*, 57 U. PITT. L. REV. 579, 609 (1996) (“[B]ecause of the absence of genuine alternatives . . . if she does not

for a woman, who endures years of physical and emotional abuse, to kill her abusive husband in his sleep.<sup>477</sup> The juxtaposition is striking and curious. While the modern orthodoxy discounts state failure within the window of imminence, feminist advocacy invokes it as the primary reason for expanding self-defense for battered women.

Notably, this feminist advocacy does not depend on any assertion that the state is overtly hostile to the interests of women<sup>478</sup> (decline of the malevolent state remember, is central to the “things have changed” defense of the modern orthodoxy). It is simply the *fact* of state failure that justifies a broader range of legitimate self-defense by battered women. The comparison to the modern orthodoxy is ironic. Progressive advocacy urges dramatic expansion of self-defense by battered women, deeming the *reasons* for government failure irrelevant. The modern orthodoxy in contrast, would constrict armed self-defense simply on the view that government failure is no longer malicious.

Other progressive commentators have pressed the issue of state failure to justify the right to abortion. Robin West argues,

To whatever degree we fail to create the minimal conditions for a just society, we also have a right, individually and fundamentally to be shielded from the most dire or simply the most damaging consequences of that failure. . . . We must have the right to opt out of an unjust patriarchal world that visits unequal but unparalleled harms upon women . . . with unwanted pregnancies.<sup>479</sup>

In a society where physical attack is a real danger (especially in communities where the risk is generally higher) and government is a demonstrably incomplete response, West’s formulation is a solid foundation for a robust right of self-defense using standard civilian technology.<sup>480</sup> It is odd that the modern orthodoxy—and perhaps progressive thinking generally—seems more comfortable with West’s

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resort to defensive aggression, she will inevitably suffer death or grievous bodily harm by the assailant.”). For critiques of the utilization of principles of self-defense to expand rights on the progressive agenda, see Johnson, *Self-Defense?*, *supra* note 463, at 187; Johnson, *Principles and Passions*, *supra* note 463, at 97; and Nicholas J. Johnson, *Supply Restrictions at the Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons and the Attitudinalist Critique*, 60 HASTINGS L.J. 1285 (2009).

<sup>477</sup> See Zipursky, *supra* note 385, at 583 (arguing that in such an instance, the wife really only has two options: kill or be killed).

<sup>478</sup> This recall is the core of the objection under the modern orthodoxy that things have changed.

<sup>479</sup> Robin L. West, *The Nature of the Right to an Abortion: A Commentary on Professor Brownstein’s Analysis of Casey*, 45 HASTINGS L. J. 961, 964–65 (1994).

<sup>480</sup> Johnson, *Principles and Passions*, *supra* note 463, at 117.

formulation in the abortion context.<sup>481</sup> When pressed, her critique of state failure provides comparatively stronger support for armed self-defense.<sup>482</sup>

## 2. *Finite Resources*

Michael de Leeuw, Counsel for the NAACP as amici in *Heller*, argues that in urban communities where Black voters have elected Black administrations, gun prohibition should be respected as an exercise of community autonomy.<sup>483</sup> But Black electoral success does nothing to diminish the limitations on state action that make self-defense a crucial private resource.

Even the best-intentioned administrations must wrestle with practical, fiscal, and political limitations.<sup>484</sup> It is fair to expect that racism will not be the reason that Black administrations fail to fully protect Black citizens. But racism is only one of many reasons for people to resist entrusting their lives to the state. The modern orthodoxy does not really answer the concerns of people like Shelly Parker and Otis McDonald, Black plaintiffs who complained that government had disarmed them but was not able to protect them.<sup>485</sup> Engaging the issue explicitly in the context of those two examples is distracting because of the myriad other implications of the *Heller* and *McDonald* decisions.

But there are many other illustrations of the problem. Consider, for example, the difficulties that plague the government and citizens of Detroit. It is a story of decline, civic tragedy, and the full range of urban

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<sup>481</sup> See *id.* at 98–99 (asserting that our recognition of abortion rights and gun rights “allow what might be crucial private choices in extreme personal crises”); Johnson, *Supply Restrictions*, *supra* note 476, at 1286 (stating that “there is a broad analytical intersection between abortion and gun-rights claims”).

<sup>482</sup> Johnson, *Principles and Passions*, *supra* note 463, at 117.

<sup>483</sup> de Leeuw et al., *supra* note 11, at 133–34.

<sup>484</sup> While failure of government in the context of imminent threats is a constant that cannot be avoided, other government failures are episodic. The reasons will vary. Historically, Blacks had good reason to expect overtly racist governments would not protect them. Today, such episodic failures are more likely to result from limited resources.

In Tulsa, Oklahoma, a search for a missing six-year-old girl tied up police. So, a 911 call about a drunk threatening gun violence waited for nine minutes before an officer could be located, and a report of a woman being beaten waited twenty minutes before an officer was able to respond. Police departments lament small increases in response time. But thirty-second shifts one way or another still do not answer the basic problem that people must fend for themselves during the crucial moments when the danger is at its peak. Do not forget that this data about response time does not incorporate the time it takes to get to a phone, and the people who are injured or killed without ever making contact with police. *Id.*; see also *Crime-Ridden Camden, N.J., Cuts Police Force Nearly in Half*, CNN (Jan. 18, 2011), [http://articles.cnn.com/2011-01-18/us/new.jersey.layoffs\\_1\\_police-force-police-officers-public-safety?\\_s=PM:US](http://articles.cnn.com/2011-01-18/us/new.jersey.layoffs_1_police-force-police-officers-public-safety?_s=PM:US) [hereinafter *Crime-Ridden Camden*].

<sup>485</sup> Jon S. Vernick et al., *Changing the Constitutional Landscape for Firearms: The US Supreme Court’s Recent Second Amendment Decisions*, 101 AM. J. PUB. HEALTH 2021 (2011).

challenges.<sup>486</sup> In the middle of it is Johnette Bartham, a young Black woman who saw opportunity in Detroit.<sup>487</sup> She learned quickly that the neighborhood where she invested \$74,000 into a three thousand square foot brick colonial placed substantial demands on residents.<sup>488</sup>

A neighbor said he would “look[] out for her” when she came home from work.<sup>489</sup> She “befriended a local policeman, who would drive by at night to check on her.”<sup>490</sup> But he was soon reassigned to another precinct. After that, if she felt unsafe returning home late at night, “she would drive to a major road, flag down a squad car and ask for an escort home.”<sup>491</sup> Break-ins became routine she explains, “I was constantly being targeted in a way I couldn’t predict, in a way that couldn’t be controlled by the police.”<sup>492</sup> One night she returned home around 1:30 in the morning to find her front door broken open and what she thought was a robbery in progress.<sup>493</sup> “She rushed back to her car to call 911 and waited there for police. They arrived at 4:41 a.m., according to their report.”<sup>494</sup>

In the past, the three-hour police response might have stemmed from overt racist neglect. In modern Detroit that is not the explanation. Today, the problem is resources. The police department is seven hundred officers short.<sup>495</sup> Chief Warren Evans has taken a triage approach, focusing on the worst crimes and hoping he is prescient enough to make this distinction with persistent accuracy.<sup>496</sup>

So how do we justify denying the standard tools of civilian self-defense to people who live under such conditions? Johnette Bartham survived to complain about a three-hour police response. But what if she had faced an immediate threat? How do we deny her the option of a handgun in her purse? Would you want that option for someone you cared about?<sup>497</sup> If that is possible, then it is not obvious why

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<sup>486</sup> Alex P. Kellogg, *Black Flight Hits Detroit*, WALL ST. J. (June 5, 2010), <http://online.wsj.com/article/SB10001424052748704292004575230532248715858.html>.

<sup>487</sup> *Id.*

<sup>488</sup> *Id.*

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*; see also *Crime-Ridden Camden*, *supra* note 484 (reporting slower police response time in Camden, New Jersey due to fewer police resources). Less than two years later, “police acknowledge that they have all but ceded [Camden] streets to crime . . . [and] are already so overloaded they no longer respond to property crimes or car accidents that do not involve injuries”. Kate Zernike, *To Fight Crime, a Poor City Will Trade in Its Police*, N.Y. TIMES (Sept. 28, 2012), <http://www.nytimes.com/2012/09/29/nyregion/overrun-by-crime-camden-trades-in-its-police-force.html?hp>.

<sup>497</sup> Her story might have proceeded two ways. She might have pulled a gun, then had it taken from her and used against her. She might have pulled it out and scared off an attacker, in which case

weakening the right to arms to allow *de jure* gun bans in Black neighborhoods or other aggressive renditions of the modern orthodoxy should be “part of any civil rights agenda.”<sup>498</sup>

#### V. REASSESSING THE MODERN ORTHODOXY

Granting my assessment to this point, some will still object that the modern orthodoxy is an essential and practical response to problem captured by William Oliver’s striking summary.

The disproportionate rates of violent crime found among African Americans have been described in numerous studies and reports. For example, the FBI reports that in 1998, African Americans, who constitute 13 percent of the general population, were overrepresented among persons arrested for murder (53 percent), robbery (55 percent), aggravated assault (30 percent) and assault (34 percent). A significant characteristic of violent crime in the United States is that most violent incidents tend to involve an interracial victim-offender relationship pattern. That is, individuals who commit acts of violence generally commit these acts against members of their own racial group. For example, in 1998, 94 percent of black murder victims were slain by black offenders. Similarly in 1998, 87 percent of white murder victims were slain by white.

. . . .

The most revealing data regarding the disproportionate impact that violent crime is having on African Americans, particularly black makes is the data on homicide victimization. According to the FBI, in 1998, black males represented 38 percent of known homicide victims, followed in descending order by white males (35 percent), white

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she would be added to the 2–2.5 million people in Gary Kleck and Marc Gertz’s Defensive Gun Use (“DGU”) count. Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). She might have fired in self-defense and avoided prosecution, but been traumatized by the aftermath or even the subject of revenge attacks by the victim’s associates. She might have fired and killed an innocent person, either with a stray bullet or because she mistook an innocent person for an attacker. The data suggest that the non-shooting DGU is far more likely. *Id.* at 173. But beyond the statistical debate is a fundamental question about the rights of the individual facing a deadly threat.

It is fair to object that guns are not a global long-term answer for the problems that afflict neighborhoods like this. That is not my claim. The focus here is the immediate problem of imminent threats. Would you want the option of a gun for yourself or a loved one if you had to move into Jonnette’s house *tonight*?

<sup>498</sup> de Leeuw et al., *supra* note 11, at 137.

females (14 percent) and black females (9 percent). High rates of homicide among African Americans also have been reported in compilations of health statistics. According to data compiled by the National Center for Health Statistics (1998), *black males had a homicide death rate of 52.6 per 100,000 in 1996*, whereas white males had a homicide death rate of 4.7 per 100,000.

As a group, violence researchers generally regard individuals in the age range between fifteen and twenty-four as the most murder prone. However, there are significant differences between black and white males of this age in terms of their homicide risk. For example, white males fifteen to twenty-four years of age had a homicide death rate of 6.4 per 100,000 in 1996, whereas *black males of this age range had a homicide death rate of 123 per 100,000*, nearly twenty times greater than similarly aged white males. Moreover, for every age range, black males have higher rates of homicide death than their white male counterparts of the same ages.

A significant trend in homicide patterns involves the increasing youthfulness of homicide offenders and victims. Young black males experienced dramatic increases in both homicide victimization and offending rates in the late 1980s and early 1990s. For example, the number of homicide victims in the fifteen to twenty-four age group increased nearly 50 percent between 1975 and 1992. Moreover, in 1987, homicide accounted for 42 percent of all deaths among young black males. Persons between the ages of fifteen and nineteen experienced the greatest increases in the rate of death due to homicide in this period. Since 1991, homicide rates have been declining among all race-sex subgroups in the United States. However it is important to note that in spite of the declining homicide rates among black males, homicide remains the leading cause of death among black males between fifteen and twenty four years of age.<sup>499</sup>

In the face of such accounts, the reflex to blame gun proliferation and wish guns away is understandable. The modern orthodoxy translates that reflex into policy with the promise that the right mix of statutory language can solve the problem by pushing the gun inventory toward zero.

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<sup>499</sup> WILLIAM OLIVER, *THE STRUCTURAL-CULTURAL PERSPECTIVE: A THEORY OF BLACK MALE VIOLENCE IN VIOLENT CRIME: ASSESSING RACE AND ETHNIC DIFFERENCES* (Darnell F. Hawkins, ed., 2003) (citations omitted). The recent trend is reflected in his distillation of the problem.



Endorsement of this approach by the Black political establishment implies that it is or should be embraced by anyone who cares about the community. This implication undergirds NAACP counsel, Michael De Leeuw's confident declaration that race targeted gun bans should be part of any Civil Rights agenda.<sup>500</sup> But closer critique reveals more diversity within the community than one might surmise and the social science raises serious substantive questions about the wisdom of the modern orthodoxy.

*A. The Modern Orthodoxy and Community Attitudes*

Even the roughest cut at the question reveals that the modern orthodoxy has less following in the community than one might expect. National polling by the Pew Research Center asked, "What do you think is more important—to protect the right of Americans to own guns, OR to control gun ownership?"<sup>501</sup> Fifty-four percent of whites and 30% of blacks said it was more important to protect gun rights compared to 66% of blacks who said it was more important to control gun ownership.<sup>502</sup> Respondents were also asked a question that reflects one of the explicit strands of the modern orthodoxy, "Should States and Localities be able to pass laws banning handguns?"<sup>503</sup> Sixty-four percent of blacks said yes and 30% said no.<sup>504</sup>

Mid-sixty percent majorities are still consistent with the intuition that many Blacks would favor gun control of some sort.<sup>505</sup> But this is substantially lower than Black allegiance to the Democratic Party, which is generally in excess of 90%.<sup>506</sup> This presents an interesting contrast with the Black leadership where Democrats predominate.<sup>507</sup> The gap suggests that a significant swath of the community is at odds with the standard position of the Black political establishment.

Pressing further into the details and the social science, the picture becomes even more complex. High rates of Black victimization from gun crimes actually cut two ways. In a population more at risk from violence, one might expect to find both a desire to keep guns from criminals and a parallel desire to possess guns for self-defense.

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<sup>500</sup> de Leeuw et al., *supra* note 11, at 137.

<sup>501</sup> *Gun Rights and Gun Control*, PEW RES. CTR. (Aug. 2010), <http://www.pewresearch.org/files/old-assets/pdf/gun-control-2011.pdf>.

<sup>502</sup> Nicholas J. Johnson, *Gun Control's Racist Origins*, LIBR. OF L. & LIBERTY (Dec. 7, 2012), <http://www.libertylawsite.org/2012/12/07/gun-controls-racist-origins/>.

<sup>503</sup> *Id.*

<sup>504</sup> *Id.*

<sup>505</sup> *Id.*

<sup>506</sup> *Id.*

<sup>507</sup> Support for gun rights is articulated by the occasional Black Republican (Ken Blackwell and Condoleezza Rice, for example). But at the grass roots, the percentage of Blacks that support Republicans is far lower than the percentage that supports gun rights. *Id.*

We see this starkly in the period that gives rise to the modern orthodoxy. A concern about violent crime and unrest during the 1960's was one driver of the Gun Control Act of 1968 and the rise of the modern gun control movement.<sup>508</sup> It also sparked an unprecedented period of firearms acquisition:

One of the major findings of The National Commission on the Causes and Prevention of Violence established by President Lyndon Johnson after the urban violence of the 1960s was that firearms became increasingly available late in that decade. . . . In brief, the sale of handguns quadrupled and the sale of long guns doubled during the 1960's. The Commission found that in many cities a sharp increase in gun sales and registrations followed a riot. In Detroit, for example, the number of handgun permits issued by the police increased by a factor of five between 1965 and 1968.<sup>509</sup>

The same phenomenon is evident in assessments focusing specifically on Black community attitudes. Paula McClain conducted a finely grained study examining the “fear and loathing” hypothesis that “firearms purchases are motivated by fear of crime, violence, and civil disorder.”<sup>510</sup> She cautioned against findings based on national data, which “makes comparisons between whites and blacks difficult because the size of the black sample is usually extremely small. Hence, generalizations from the sample could be distortions of real population parameters.”<sup>511</sup>

McClain examined perceptions of risk, patterns of gun ownership, and attitudes toward gun regulation between blacks and whites at the neighborhood rather than the national level.<sup>512</sup> She surveyed blacks and whites in distinct Detroit neighborhoods categorized by race and risk factors—e.g., white high risk, black high risk.<sup>513</sup> Her findings contradicted studies that used national data. For example, early research based on national data found that blacks were less likely to report having a gun in the home.<sup>514</sup> McClain found the rate of gun ownership between whites and Blacks “relatively the same across neighborhoods studied, with the

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<sup>508</sup> See Gun Control Act of 1968, 18 U.S.C. § 921 (2006), § 101, Pub. L. No. 90-618, 82 Stat. 1213.

<sup>509</sup> Reynolds Farley, *Homicide Trends in the United States* at 20, in DARNELL F. HAWKINS, *HOMICIDE AMONG BLACK AMERICANS* (Darnell F. Hawkins ed., 1986); see also Gary Kleck, *Capital Punishment, Gun Ownership, and Homicide*, 84 AM. J. SOCIOLOGY 882, 907–08 (1979) (discussing the relationship between increased gun ownership and increased homicide rates in the 1960s).

<sup>510</sup> Paula D. McClain, *Firearms Ownership, Gun Control Attitudes, and Neighborhood Environment*, 5 LAW & POL'Y Q. 299, 300 (1983).

<sup>511</sup> *Id.*

<sup>512</sup> *Id.* at 302.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.* at 304.

exception of whites living in black low risk neighborhoods<sup>515</sup> who reported owning more guns than any other group.<sup>516</sup>

With regard to differential Black and white attitudes about gun regulation, McClain found that the number of questions and specificity of the questions made important differences:

The attitudes of the residents of the four kinds of neighborhoods varied in regard to their support for or opposition to various forms of gun regulation proposals. . . . The policy position with the most support among the five groups was that requiring individuals to obtain a police permit before purchasing a firearm. At least three-fourths of the respondents of all five groups were supportive of this policy. The policy option with the least support among the groups was the confiscation of all weapons except for those of the police. *The support for confiscation ranged from a high of 26% among blacks in a high risk area to a low of 10.16% among blacks in a low risk area. . . .*

Support for having the government sell firearms through government-owned stores, much like liquor is sold in states like Pennsylvania, also varied substantially. Blacks in high risk neighborhoods are again the least supportive—19.4%. . . .

With few exceptions, individuals in the five groups appeared to be almost evenly divided in their support for and opposition to the regulation of only handguns. In most neighborhoods at least 40% of the people questioned supported handgun regulation and at least the same percentage opposed it. . . .

*The indication that the supportive responses vary depending on the policy option is a significant finding. It is significant because previous studies, which have primarily utilized the permit question, have consistently found that a majority of people support gun control. . . . The variability in the responses to the other questions, however, clearly calls into question the reliability of a one-item indicator as a measure of gun control attitudes. . . .*

From an index of gun regulation attitudes, the results differ widely from previous studies. Blacks in high risk neighborhoods have a more favorable attitude toward some

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<sup>515</sup> *Id.*

<sup>516</sup> *Id.* at 305.

form of regulation than do whites in high-risk neighborhoods—52.7% and 34.9%, respectively. Conversely, a greater proportion of whites in high risk neighborhoods oppose regulation (46.5%) than do blacks in similar risk neighborhoods (37.8%).

There also appears to be a difference in the attitudes of blacks and whites in low risk neighborhoods. Blacks, once again, appear to favor regulation in a greater proportion than do whites (40.4% and 34.7%, respectively); however, the difference is not as great as between blacks and whites in high risk areas. Interestingly, whites residing in neighborhoods defined as black low risk favor regulation in approximately the same proportion as do blacks. *Thus the results of the computed gun regulation index show that urban residents are less overwhelmingly supportive of gun regulation than is suggested by studies that use the one-item indicator.*<sup>517</sup>

Other studies focusing specifically on Black attitudes show that a significant cohort of Blacks favors prohibition or other strong limits on the criminal subculture but disfavor blanket prohibition that would impede self-defense by trustworthy people. A study by Brennan and Lizotte, found that Blacks disfavored gun bans at higher levels than whites, even though they favored measures like permits and registration at levels higher than whites.<sup>518</sup> This comports again with the intuition that many people who fear of violence will want guns to protect themselves and also favor laws promising to keep guns from criminals.

This is just a snapshot of the social science. I do not claim that it is dispositive. But it does confirm the intuition that Black criminality might drive Black demand for lawfully owned guns just as readily as it fuels support for the supply control policies of the modern orthodoxy. This suggests a diversity of attitudes about firearms policy that is underrepresented by Black political establishment and obscured by overwhelming Black allegiance to the Democratic Party.

#### B. *Competing Critiques of Black Criminality*

It is a mistake to conclude that the modern rate of violent crime is an

<sup>517</sup> *Id.* at 307–08 (emphasis added).

<sup>518</sup> Pauline G. Brennan, Alan J. Lizotte & David McDowall, *Guns, Southernness, and Gun Control*, 9 J. QUANTITATIVE CRIMINOLOGY 289, 304 (1993). The Pew Study, on the other hand, found that 38% of whites and 64% of Blacks thought states and localities should be able to pass laws banning handguns. *Public Divided over State, Local Laws Banning Handguns*, PEW RES. CTR. (Mar. 23, 2010), <http://www.people-press.org/2010/03/23/public-divided-over-state-local-laws-banning-handguns/>.

unprecedented variable that easily explains the modern orthodoxy. The fact is that the Black tradition of arms has long demanded a balancing of the self-defense interest of good people in the community against high costs of criminal violence and traditionally, the community has privileged lawful self-defense.

A report sponsored by the National Institute of Mental Health reviewed a series of early studies showing that very high rates of homicide victimization and violent crime among Blacks is not unprecedented:

The risk of homicide victimization in the black community has traditionally been high in large urban environments. Brearley, reporting on the level of victimization in selected cities in 1925, substantiates this point. Victimization rates were higher during that era than they are at present. It was not uncommon to find victimization rates in excess of 100 per 100,000.<sup>519</sup>

These victimization data do not explicitly indicate the race of the perpetrators, but the dismissive local government response is suggestive.

By 1925, southern cities were already renowned for the level of violence present within the black community. Memphis, in 1930, was described as the homicide capital of the nation. The city fathers were said to explain this situation by indicating "most of the murders were of negroes by negroes, so the police and government could not be held responsible."<sup>520</sup>

The 1925 victimization rates in several cities exceeded the modern rates summarized by William Oliver at the beginning of this section.<sup>521</sup> The Black homicide victimization rate per 100,000 of population in Chicago, Detroit, and Cleveland were approximately 103, 113, and 101, respectively.<sup>522</sup> In Memphis, the rate was 129.<sup>523</sup> In Cincinnati, it was approximately 190.<sup>524</sup> And in Miami, the reported rate was approximately 208 per 100,000.<sup>525</sup>

In 1958, preeminent criminologist Marvin Wolfgang published the classic, *Patterns in Criminal Homicide*, which focused substantially on

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<sup>519</sup> HAROLD M. ROSE & PAULA MCCLAIN, CTR. FOR MINORITY GRP. MENTAL HEALTH PROGRAMS, NAT'L INST. OF MENTAL HEALTH, GRANT #5 RO1 MH 29269-02, BLACK HOMICIDE AND THE URBAN ENVIRONMENT 174 (1981).

<sup>520</sup> *Id.* at 175.

<sup>521</sup> OLIVER, *supra* note 499, at 281-83.

<sup>522</sup> ROSE & MCCLAIN, *supra* note 519, at 175.

<sup>523</sup> *Id.*

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

Philadelphia during the period 1948–1952 and surveyed the findings of a variety of earlier studies from across the country.<sup>526</sup> Wolfgang reported that during the four-year period of the study, Blacks were 18% of the population but 73% of homicide victims and 75% of homicide offenders.<sup>527</sup> Then, as now, Black males dominated the ranks of victims (77% of Black victims) and perpetrators (80% of Black perpetrators).<sup>528</sup> Wolfgang surmised, without testing, that economic desperation contributed to the high rates of violence, calculating that 90% to 95% of all offenders in the study (Black and white) were “in the lower end of the occupational scale.”<sup>529</sup>

The availability of guns was not a plausible explanation for Wolfgang’s findings. The instrument most often used by Black murderers was the knife.<sup>530</sup> Stabbing accounted for 47% of the homicides of Black victims.<sup>531</sup> It is unclear how much this reflected the general trend, and Wolfgang notes studies from several other cities where shooting was the leading cause of Black homicides.<sup>532</sup>

Wolfgang noted that “no homicide figures were classified according to color prior to 1921,” but summarized a variety of studies conducted after data became available.<sup>533</sup> A 1940 assessment of seven sections of the southern United States with high homicide rates concluded that the murder and manslaughter rate for Blacks was “twelve times that of whites.”<sup>534</sup> A study of Birmingham from 1937 to 1944 showed that Blacks represented 85% of homicide convictions and 40% of the population.<sup>535</sup> In St. Louis from 1949 to 1951, Blacks committed 73% of homicides and represented 18% of the population.<sup>536</sup> Wolfgang cautioned that these data may be skewed by the fact that conviction rates for Blacks were consistently higher than for whites in the southern states surveyed.<sup>537</sup>

Outside the South, studies of victimization rates (race of the perpetrator not specified) suggest a similar trend. During 1920 and 1925, homicide victimization rates per 100,000 for Pennsylvania were “considerably higher for Blacks than for whites both in urban and rural

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<sup>526</sup> MARVIN E. WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 5 (Univ. Pa. 1958).

<sup>527</sup> *Id.* at 31.

<sup>528</sup> *Id.* at 35.

<sup>529</sup> *Id.* at 37.

<sup>530</sup> The penknife, switchblade, kitchen knife, and ice pick accounted for 45% of all weapons used by Black perpetrators in criminal homicides from 1948 to 1952. *Id.* at 84.

<sup>531</sup> *Id.*

<sup>532</sup> *Id.* at 90–95.

<sup>533</sup> *Id.* at 40.

<sup>534</sup> *Id.* at 41.

<sup>535</sup> *Id.* at 43.

<sup>536</sup> *Id.* at 45.

<sup>537</sup> *Id.* at 44.

communities.”<sup>538</sup> In urban areas, whites had a homicide rate of 5.3 compared to 47.1 for Blacks.<sup>539</sup> In comparison, the white rate was 3.4 and the Black rate was 45.2 in rural areas.<sup>540</sup> Between 1921 and 1930 in thirty-seven upstate New York counties, the homicide victimization rate per 100,000 for whites was 2.8 and 30.4 for Blacks.<sup>541</sup> As shown in the subsections below, squaring these historically exceptional rates of violence and victimization with the modern orthodoxy and with my criticism here is instructive.

### 1. *The Black Tradition of Arms and the Violent Criminal Microculture*

The first part of this article details a strong Black tradition of arms responding to racist aggression and state failure. To the degree that high homicide victimization rates reflect interracial conflict (the early victimization studies do not reliably indicate the race of the perpetrator)<sup>542</sup> fear of such encounters is consistent with the Black tradition of arms that I have elaborated.<sup>543</sup>

Alongside that tradition, the dominant theme in the modern era is the story of Black criminality and intra-racial homicide. The fact that high intra-racial homicide rates are nothing new suggests that Black tradition of arms has long required balancing between the legitimate self-defense interests of good people against the costs of criminal activity. Even at the exceptional rates detailed by Wolfgang, Beardsley, and others, Black homicide is still fairly attributable to slim criminal microculture.

More than 100 years ago, Du Bois dubbed this microculture the “submerged tenth.”<sup>544</sup> In *The Souls of Black Folk*, he lamented the rise of “a distinct criminal class” in the urban slums.<sup>545</sup> In the sociological study, *The Philadelphia Negro*, Du Bois tracked the activity of a Black criminal

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<sup>538</sup> *Id.* at 45.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.*

<sup>541</sup> *Id.*

<sup>542</sup> *Id.* The early studies of the victimization rate do not reliably indicate the race of the perpetrator. The victimization rate in the New York study was calculated from death certificates. We are left to speculate on the race of the perpetrator.

<sup>543</sup> The possibility that Black deaths from homicide have always been predominately from intra-racial conflict suggests that fear of racist violence occupies a place in our collective psyche out of proportion to the actual attacks. See STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 62 (2009) (claiming that racist terror groups generated fear and apprehension far out of proportion to their activities because “[o]ne or two lynchings went a long way toward inducing docility among even a large group of people, for people respond strongly to strong incentives”).

<sup>544</sup> W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO* 311 (1899); see LEWIS, *supra* note 31, at 206 (describing the people at the “bottom of the Seventh Ward heap” as a “class of criminals, prostitutes, and loafers”).

<sup>545</sup> W.E.B. Du Bois, *The Souls of Black Folks*, in *THREE NEGRO CLASSICS* 329 (Avon 1965) (1903).

class that in many ways mirrored the modern Black criminal microculture.<sup>546</sup> He reported that life in Philadelphia's Seventh Ward in the late 1890's was "hard noisy and deadly for too many of the lack people there. On Saturday nights [the neighborhoods and bars] disgorged [the] maimed and murdered clients and dwellers before morning."<sup>547</sup> Displaced from economic opportunities by other races and ethnicities monopolizing certain industries, "it was not surprising that many Seventh Ward Blacks sought release in drugs and crime or savagely turned on each other out of rage or a sense of hopelessness."<sup>548</sup> In commentary that rings consistent with modern anxieties, Du Bois recalled his days in the "slums" of Philadelphia, "where in the night when pistols popped, you didn't get up lest you couldn't."<sup>549</sup>

Black leaders from the Mississippi Delta on the Committee for Better Citizenship agitated to "ensure greater punishment for black criminals who committed offenses against blacks."<sup>550</sup> Delta civil rights leader and staunch armed self-defense advocate T.R.M. Howard complained that failure of the state to punish Black-on-Black crime was another indictment of separate but equal, arguing that the "greatest danger to Negro life in Mississippi is not what white people do to Negroes but what the courts of Mississippi let Negroes of Mississippi do to each other."<sup>551</sup> In 1939, Sociologist Hortense Powdermaker advanced a different assessment, arguing that state malevolence and neglect exacerbated intra-group

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<sup>546</sup> DU BOIS, *THE PHILADELPHIA NEGRO*, *supra* note 544, at 240–41, 248–50 (explaining that the sudden increase in crime perpetuated by African Americans was due to their relatively late arrival in cities and providing statistics about the rates of crime and types of crime likely to be committed by African Americans).

<sup>547</sup> LEWIS, *supra* note 31, at 186.

<sup>548</sup> *Id.* at 187.

<sup>549</sup> W.E.B. DU BOIS, *THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY* 195 (Int'l Publishers 1968); see Monroe N. Work, *Crime in Cities*, in *NOTES ON NEGRO CRIME PARTICULARLY IN GEORGIA: A SOCIAL STUDY MADE UNDER THE DIRECTION OF ATLANTA UNIVERSITY BY THE NINTH ATLANTA CONFERENCE* (W.E.B. Du Bois ed., Atlanta Univ. Press 1904), available at <http://babel.hathitrust.org/cgi/pt?id=inu.32000001728924;page=root;view=image;size=100;seq=1;num=1> (considering past rates of Black crime and arrest rates in cities, which reached a high in Philadelphia of 150 arrests per every 1,000 Black residents in 1864, and noting that "peculiar conditions of the Negro, past and present, tend to keep the crime rate high").

<sup>550</sup> DAVID T. BEITO & LINDA ROYSTER BEITO, *BLACK MAVERICK: T.R.M. HOWARD'S FIGHT FOR CIVIL RIGHTS AND ECONOMIC POWER* 67–68 (2009).

<sup>551</sup> *Id.* at 73 (citing Mississippi Regional Council of Negro Leadership, Prospectus, at 13–14). Some modern commentators, in contrast, are highly critical of U.S. criminal justice system incarceration policy. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW, MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 96–98 (2010) (noting that in at least 7 states, African-Americans account for 80% to 90% of all incarcerated drug offenders, and that in at least 15 states, Black men are imprisoned on drug charges at rates from 20- to 57-times the incarceration rates of their white peers and arguing that these disparities exist even though "[p]eople of all races use and sell illegal drugs at remarkably similar rates").



violence by Blacks who were wary about entanglements with the white power structure.<sup>552</sup>

Social scientists continue to debate the core impulse that drives people to murder.<sup>553</sup> But attribution of the Black homicide rate to a slim microculture is consistent with research showing that most murders are extreme aberrants with long histories of criminal activity and psychopathology and violence. Delbert Elliot explained that “the vast majority of persons involved in life-threatening violence have a long criminal record with many prior contacts with the justice system.”<sup>554</sup> The aberrance of murderers is so solidly demonstrated in the literature that Kennedy and Braga dub it one of the “criminological axioms.”<sup>555</sup> Robert Cottrol applied this critique explicitly to the black community and offered a detailed assessment of the influences that may have shaped the Black microculture of violence.<sup>556</sup>

The fact that the Black tradition of arms grew up alongside exceptional rates of black homicide, is consistent with a decision that acts of the criminal microculture do not justify impairing the legitimate self-defense interest of the sober mature members of the community. Indeed the dangers created by the criminal microculture actually strengthen the claims of good people to standard tools of self-defense. On top of that, the failed experiments in Washington D.C. and elsewhere show that making guns illegal for the Parker/McDonald class<sup>557</sup> do not and cannot stop the violent microculture from getting guns.

## 2. *Exceptional Black Criminality and Blanket Gun Bans*

The modern orthodoxy does not expressly reject the thesis that exceptional black victimization and criminality is attributable to a slim microculture. But blanket gun bans, like those urged as core policy under the modern orthodoxy, do carry the implication that the Black community at large cannot be trusted with guns (and knives as well, if we integrate Marvin Wolfgang’s study of Philadelphia). This is an unavoidable implication of the view that targeted gun bans in certain Black communities should be part of any civil rights agenda. To be fair,

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<sup>552</sup> POWDERMAKER, *supra* note 25, at 329–34.

<sup>553</sup> See, e.g., *infra* note 561 (exploring the three views on the subject of violence: pure nonviolence, violence exercised in self-defense, and violence as a tool of advancement, and stating that “many Negroes are being tempted today” toward the impulse to use violence as a method to achieve advancement).

<sup>554</sup> Delbert S. Elliott, *Life Threatening Violence Is Primarily a Crime Problem: A Focus on Prevention*, 69 U. COLO. L. REV. 1081, 1093 (1998).

<sup>555</sup> David Kennedy & Anthony Braga, *Homicide in Minneapolis: Research for Problem Solving*, 2 HOMICIDE STUD. 263–90 (1998).

<sup>556</sup> Robert J. Cottrol, *Submission Is Not the Answer: Lethal Violence, Microcultures of Criminal Violence and the Right to Self-Defense*, 69 U. COLO. L. REV. 1029, 1040–42 (1998).

<sup>557</sup> See *supra* note 493.

advocates of the modern orthodoxy would probably prefer that no one have guns. But short of that, they are clearly willing to settle for targeted gun bans just in places with large Black populations and aggressive criminal microcultures. This is perverse.

Under the banner of civil rights, this policy would brand the entire community with a badge of inferiority through a race-coded deprivation of an established prerogative of American citizenship. It resonates disturbingly with early racist claims “that colored men were unfit for citizenship,”<sup>558</sup> and rationalizations of Black Code gun restrictions targeting Freedmen.<sup>559</sup> The results from Washington D.C. already show that this prescription only bars legal guns and does little to block illegal guns from the violent micro-culture. So, for a negligible impact on the real target, the policy stigmatizes entire urban enclaves as untrustworthy.<sup>560</sup> This irony invites questions that suggest the true appeal of the modern orthodoxy.

The promise of an easy answer—gun bans—to the exceptional rate of violence among Blacks and especially among young black men is politically appealing because it offers a seemingly straightforward solution to a far deeper problem that in reality has no easy answer. Consider the more serious attempts to explain the exceptional rate of Black male violence summarized by William Oliver:

There exists very little consensus among criminologists and other crime scholars regarding “the causes” of black male violence. Numerous explanations have been offered, including acquired biological causes (e.g., head injuries); social disorganization and inadequate socialization; poverty and economic inequality; racial oppression and displaced aggression; adherence to the norms of a subculture of violence; joblessness and family disruption; the cheapening of black life as a result of the imposition of lenient sentences against blacks who assault or murder blacks; and involvement in self-destructive lifestyles centered around heavy drinking, drug abuse and drug trafficking, and street gangs. Theoretical explanations of black male violence have

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<sup>558</sup> CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT AND THE BETRAYAL OF RECONSTRUCTION* 5 (2008).

<sup>559</sup> See Cramer, *supra* note 134, at 20 (describing the Black Codes enacted after the Civil War that prohibited blacks from carrying or possessing firearms or bowie knives without licenses to do so); Cottrol & Diamond, *supra* note 134, at 1324 (describing the “Black Codes,” including laws limiting the rights of freed blacks to testify against whites, as well as travel, assembly, and businesses restrictions and others).

<sup>560</sup> Michael de Leeuw and others who advance the modern orthodoxy focus almost exclusively on the urban underclass and fail to account for the possibility of a still vibrant rural and even suburban culture of arms among Blacks. The discussion in Part III, *supra*, suggested, but did not fully develop, how the modern orthodoxy arose as a reaction to urban violence.

generally emphasized the significance of structural factors or cultural factors.<sup>561</sup>

Although they represent a minority viewpoint, some criminologists maintain that racial differences in violent crime offending may stem from genetic/non-acquired biological factors.<sup>562</sup>

This assessment leaves the leadership and public officials with two choices. One is to acknowledge that there is no ready diagnosis, and therefore no viable public solution to the problem (thus strengthening private claims to self-help). The alternative is to claim there is a ready solution to the problem, but it has failed because of the NRA or other bogeymen who block stringent gun control.

A separate political appeal of the modern orthodoxy is that it avoids stigmatization and class distinctions inherent the criminal microculture critique.<sup>563</sup> This boundary drawing will be especially problematic for the black political class who may rightly worry that in communities with high offender rates,<sup>564</sup> any attempt to stigmatize the criminal class (people who are not just isolated criminal actors, but also sons, fathers, and nephews), will be inflammatory.<sup>565</sup> Comparatively, calling for stringent gun control is

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<sup>561</sup> William Oliver, *The Structural-Cultural Perspective: A Theory of Black Male Violence*, in *VIOLENT CRIME: ASSESSING RACE AND ETHNIC DIFFERENCES* 280 (Darnell F. Hawkins ed., 2003) (citations omitted).

<sup>562</sup> *Id.*

<sup>563</sup> This is a politically uncomfortable, but potentially useful analytical step. Criminologist Darnell Hawkins argues:

There is substantial evidence that much could be learned about black homicide and other aspects of black life in the United States if more careful attention were paid to differences among blacks as well as between black and whites. The incidence of homicide among blacks, as among nonblacks, is significantly correlated with social class. . . . [T]he study of homicide among blacks may benefit from a within-group as well as a between-group analytic framework.

Darnell F. Hawkins, *Introduction to HOMICIDE AMONG BLACK AMERICANS* 3, 8 (Darnell F. Hawkins ed., 1986).

<sup>564</sup> That has led to just as much criticism of the criminal justice system as the behavior that caused the incarceration. Witness for example, the recent widely acclaimed book from Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012), arguing that traditional limitations on felon's rights is the new Jim Crow.

<sup>565</sup> Careful politicians might navigate this by distinguishing between the full population of offenders (which might be quite high) and the microculture of violent predators, which is quite small. See, e.g., Don B. Kates & Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide? A Review of International and Some Domestic Evidence*, 30 HARV. J.L. & PUB. POL'Y 649, 677 (2007) (asserting that "murderers generally fall into a group some criminologists have called 'violent predators,' sharply differentiating them not only from the overall population but from other criminals as well"). On the other hand, a recent report indicated that nearly one in six residents of Newark, New Jersey had been arrested at some point. Howard Husock, *From Prison to a Paycheck*, WALL ST. J. (Aug. 3, 2012), <http://online.wsj.com/article/SB10000872396390443866404577565170182319412.html>. Newark Mayor Corey Booker's focus on assisting ex-offenders and reintegrating them into the work force is understandable as good economics and good politics. See *id.* (describing the Newark ex-

the path of least resistance.

*C. Firearms Policy and the Interests of Innocents*

Regardless of how we choose to integrate the historic homicide trends into our thinking today, those trends eliminate an important strand of the claim that “things have changed.” This section focuses on the remaining assumptions rooted in firearms costs and benefits.

Otis McDonald and Shelly Parker claimed that policies rooted in the modern orthodoxy impaired their fundamental right to self-defense. Protecting the interests of this class of innocents is a crucial gauge of sound firearms policy in the black community. So what sort of regulation leaves the Parker/McDonald class<sup>566</sup> better or worse off?

It is plausible that they are better off under a zero gun environment. That was the presumption the of Washington D.C. gun ban. The difficulty is that this was an unworkable policy before *Heller* and unconstitutional after it. The “no guns” equals “no gun crime” logic would be compelling if it could be implemented; if for example, we were starting from zero and deciding whether to have guns or not. The problem is that Americans already own almost 300 million guns<sup>567</sup> and have a deep cultural attachment to them.

We know from international data that people defy gun bans at a rate that produces 2.6 illegal guns for every legal one.<sup>568</sup> This is simply the average. In many countries the defiance ratio is far higher.<sup>569</sup> And none of those places have as robust a gun culture as the United States. The upshot is that neither, *Heller*, *McDonald*, weak gun laws, nor NRA lobbying are the principle obstacles to successful gun prohibition. The obstacle is that Americans already own nearly half the private firearms on the planet and have an exceptional cultural attachment to them.<sup>570</sup> Whatever the dynamic elsewhere, *de jure* prohibition really just means tilting the distribution of firearms toward the worst people in the community.

The affiliated, compromise position of spot firearms bans only for black communities is a demonstrably failed experiment. The proffered excuse for this failure and for the extraordinary levels of gun violence in Washington, D.C., despite its gun ban, was that criminals were getting

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offender employment assistance program and the “importance of assisting ex-offenders, if only as part of the crime reduction [Mayor Booker] sees as the foundation of Newark’s economic renewal”).

<sup>566</sup> This is the class of law-abiding adults and excludes the microculture of aggressive young criminals.

<sup>567</sup> Johnson, *Imagining Gun Control*, *supra* note 388, at 843.

<sup>568</sup> *Id.* at 853.

<sup>569</sup> *See id.* at 854 (providing statistics on the defiance rate in England, China, and Germany).

<sup>570</sup> *Id.* at 855–56, 853 n.77.

guns from other jurisdictions.<sup>571</sup> The solution, proponents said, was extension of D.C. style gun restrictions to neighboring jurisdictions. But even before *Heller*, that was a pipe dream in America.<sup>572</sup> Spot prohibition failed in D.C. because anyone who was willing to break the law could get a gun from the leakage out of the hundreds of millions already in the civilian inventory.<sup>573</sup> In practical terms, this core policy of the modern orthodoxy amounted to *de jure* prohibition but *de facto* gun ownership by the criminal microculture. Places like Washington, D.C. and Chicago that followed this policy had nation leading gun crime. They were also places where the Parker/McDonald class was essentially under siege.<sup>574</sup>

The policy sought by Parker and McDonald is continued stringent rules formally prohibiting criminal micro class from owning guns and allowing legal access to guns for non-criminals. This approach is consistent with the Black tradition of arms. Objections to this approach center on hazards and social costs of firearms. But those objections overstate firearms costs and fail to account for the offsetting benefits of lawful gun possession. The next two sub-sections critique those costs and benefits.

### 1. *Costs*

#### a. Is Armed Self-Defense Ineffective and Uncommon?

One way of dismissing the self-defense interest of the Parker/McDonald class is to say that their desire for defensive firearms is misguided; that armed self-defense is ineffective, uncommon, or counterproductive. Some advance the debunked factoid that you are 44 times more likely to hurt yourself or someone you love than to use the gun

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<sup>571</sup> This complaint has fueled federal legislative proposals like H.R. 452, the Gun Trafficking Prevention Act. Gun Trafficking Prevention Act of 2013, H.R. 452, 113th Cong. (1st Sess. 2013). Representative Carolyn McCarthy argues: "Guns are often trafficked from states with weaker gun laws to states with stronger gun laws. . . . The ATF has identified several major gun trafficking routes, including the I-95 'Iron Pipeline' corridor between Miami and Boston." *Gun Safety*, CONGRESSWOMAN CAROLYN MCCARTHY, <http://carolynmccarthy.house.gov/gun-safety3/> (last visited Mar. 7, 2013).

<sup>572</sup> See Johnson, *Imagining Gun Control*, *supra* note 388, at 852 (looking to New York City in particular, and acknowledging "that tough municipal laws alone are not enough" and that "[t]he source of some of the contraband guns . . . come from scofflaw dealers from other states").

<sup>573</sup> Roughly 500,000 guns are stolen each year. NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 74 (Charles F. Wellford et al., eds., 2005).

<sup>574</sup> This problem is exacerbated by the fact that prohibition policies always have been extreme policy outliers, strikingly at odds with the national norms. See, e.g., Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 262–63 (2008) (citing Supreme Court jurisprudence, including *Romer v. Evans*, 517 U.S. 620 (1996), where the Court struck down "a highly unusual Colorado state constitutional amendment precluding state or local action banning measures forbidding discrimination on the basis of sexual orientation").

for self-defense.<sup>575</sup> This conjures images of June Cleaver mistakenly shooting Ward when he arrives home early from a business trip. The image is false. The factoid comes from a study that only counted gun deaths, most of which were suicides, and completely ignored the vast majority of defensive gun uses. The data show that Americans defend themselves with guns at a startling rate.

There have been 14 major surveys of defensive gun use (“DGU”). The estimates range from highs above 2 million to lows in excess of 100,000.<sup>576</sup>

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<sup>575</sup> Arthur L. Kellermann & Donald T. Reay, *Protection or Peril? An Analysis of Firearm-Related Deaths in the Home*, in THE GUN CONTROL DEBATE: YOU DECIDE 239, 243 (Lee Nisbet ed., 1990). The 43-times more likely claim is a result of Kellermann and Reay counting 743 gunshot deaths in King County, Washington, which includes Seattle, from 1978 to 1983. *Id.* at 240. For every case where a gun in the home was used in a justifiable killing, there were 4.6 criminal homicides, 37 suicides, and 1.3 unintentional deaths. *Id.* at 242; see also Stevens H. Clarke, *Firearms and Violence: Interpreting the Connection*, POPULAR GOV’T, Winter 2000, at 3, 9 (citing to the Kellermann and Reay study and asserting that “[t]he inference from such studies is that guns in the home are far more likely to be used in illegal or undesirable killings than in legitimate ones”).

Gary Kleck shows that the core mistake in Kellermann’s claim is the failure to include the millions of yearly defensive gun uses where no one is shot and the gun is not even fired. See GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 128–29 (1991) [hereinafter POINT BLANK] (asserting that the Kellermann and Reay study “unwittingly replicated” a study which was criticized because merely accounting for “the number of burglars killed does not in any way serve as a measure of the defensive benefit of keeping a gun”); Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 181 (1995) [hereinafter *Armed Resistance to Crime*] (critiquing Kellermann and Reay’s approach of comparing the “number of lives taken with guns with the number of criminals killed by victims”). Gary Kleck finds that “fewer than 2% of fatal gun accidents (FGAs) involve a person accidentally shooting someone mistaken for an intruder. With about 1400 FGAs in 1987, this implies that there are fewer than 28 incidents of this sort annually.” KLECK, POINT BLANK, *supra*, at 122.

Also, the homicide numbers in the Kellerman study do not translate into a general risk factor for the population at large. Generally, murderers are extreme aberrants who will already exhibit a variety of other risk factors that make them outliers in the population. See *supra* text accompanying notes 436–38.

Gun control advocate Andrew McClurg, who finds suicides still a compelling reason for strict gun control, makes a remarkable observation:

Most people are surprised to learn that annual firearm suicides routinely outpace firearm homicides. In 1996, . . . 18,166 Americans committed suicide with a firearm, substantially more than the 14,327 victims of homicide by firearm the same year. Firearm suicides have exceeded firearm homicides in forty of the sixty years between 1933 and 1992. For all our fear of being victims of a violent criminal attack, “[i]f a randomly chosen person adds up the probabilities that each of the five and one-half billion other people in the world will kill her, the sum . . . is still less than the probability she’ll kill herself.”

Andrew J. McClurg, *The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,”* 51 HASTINGS L.J. 953, 960 (2000) (alteration in original) (citations omitted) (quoting John Allen Paulos, *A Better Chance You’ll Shoot Yourself than Be Shot by Another*, PUB. PERSPECTIVE, June–July 1995, at 17, 17).

<sup>576</sup> There have been at least fourteen surveys regarding the frequency of DGU in the modern United States. See Kleck & Gertz, *Armed Resistance to Crime*, *supra* note 575, at 157 (asserting that “[a]t least thirteen previous surveys have given a radically different picture of the frequency of DGUs”

compared to the National Crime Victimization Survey). The surveys range from a low of 760,000 annually to a high of almost 3 million. In contrast, much lower annual estimates come from the NCVS, a poll using in-person home interviews conducted by the Census Bureau in conjunction with the Department of Justice. *Data Collection: National Crime Victimization Survey (NCVS)*, BUREAU OF JUSTICE STATS., <http://bjs.ojp.usdoj.gov/index.cfm?ty=dcdetail&iid=245> (last updated Apr. 17, 2012). These surveys define “defensive gun use” to include instances where an attack is thwarted without discharge of the gun. See Kleck & Gertz, *Armed Resistance to Crime*, *supra* note 575, at 169 (“Many of the ‘gun crimes’ in the NCVS . . . do not involve the gun actually being used by the criminal. Thus, the NCVS estimate . . . overstates the number of crimes in which the offender actually used the gun.”). These non-shooting DGUs constitute the vast majority of the total. See, e.g., GUN CONTROL AND GUN RIGHTS: A READER AND GUIDE 6–33 (Andrew J. McClurg et al. eds., 2002) (detailing the debate regarding the effectiveness of guns for self-defense and providing statistics on the number of DGUs).

Critics say the NCVS figure is too low because the survey never directly asks about DGUs. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 152 (1997) [hereinafter KLECK, TARGETING GUNS]; Philip J. Cook & Jens Ludwig, *Defensive Gun Uses: New Evidence from a National Survey*, 14 J. QUANTITATIVE CRIMINOLOGY 111, 115 n.8 (1998). The NCVS first asks if the respondent has been a “victim” of a crime. See Cook & Ludwig, *supra*, at 128 (“It is worth noting that the NCVS asks DGU questions only of those respondents who report a victimization.”). Critics charge that this excludes successful DGUs where people do not consider themselves “victims.” Additionally, critics charge, the NCVS only asks about some crimes and not the full range of crimes where a DGU might occur. See, e.g., KLECK, TARGETING GUNS, *supra*, at 152–53 (Respondents “are not directly asked about DGUs, but rather are only generally asked about anything they might have done for self-protection. . . . [T]hey are merely offered an opportunity to volunteer mention of a DGU, but are never put in a position of having to lie in order to deny a DGU.”).

Gary Kleck and Mark Gertz conducted an especially thorough survey in 1993, with stringent safeguards to cull respondents who might mischaracterize a DGU story. Kleck and Gertz found a midpoint estimate of 2.5 million DGUs annually. See Kleck & Gertz, *Armed Resistance to Crime*, *supra* note 575, at 164. The Kleck and Gertz survey found that 80% of DGUs involved handguns, and that 76% did not involve firing the weapon, but merely brandishing it to scare away an attacker. *Id.* at 175.

Marvin Wolfgang, one of the most eminent criminologists of the twentieth century and an ardent supporter of gun prohibition, reviewed Kleck’s findings and observed:

I am as strong a gun-control advocate as can be found among the criminologists in this country. . . . I would eliminate all guns from the civilian population and maybe even from the police. I hate guns. . . .

Nonetheless, the methodological soundness of the current Kleck and Gertz study is clear. . . .

The Kleck and Gertz study impresses me for the caution the authors exercise and the elaborate nuances they examine methodologically. I do not like their conclusions that having a gun can be useful, but I cannot fault their methodology. They have tried earnestly to meet all objections in advance and have done exceedingly well.

Marvin E. Wolfgang, *A Tribute to a View I Have Opposed*, 86 J. CRIM. L. & CRIMINOLOGY 188, 188, 191–92 (1995).

Philip Cook of Duke University and Jens Ludwig of Georgetown University were skeptical of Kleck’s results and conducted their own survey, the National Survey of Private Ownership of Firearms, sponsored by a grant from the National Institute of Justice to the Police Foundation. That survey produced an estimate of 1.46 million DGUs per year. PHILIP J. COOK & JENS LUDWIG, GUNS IN AMERICA: RESULTS OF A COMPREHENSIVE NATIONAL SURVEY OF FIREARMS OWNERSHIP AND USE 108 (1996). Cook and Ludwig argue that their own study produced implausibly high numbers, and they state that the NCVS estimate is more reliable. *Id.* at 102. For a response to Cook and Ludwig, see Gary Kleck, *Has the Gun Deterrence Hypothesis Been Discredited?*, 10 J. FIREARMS & PUB. POL’Y 65,

The compromise estimate is around 700,000 DGU's per year.<sup>577</sup> And there is no indication that this phenomenon excludes blacks. A significant aspect of these DGU's is that in the vast majority of them, *no shots are fired*.<sup>578</sup>

Another objection is that armed self-defense just does not work; that you will have your gun taken and used against you. This claim is generally at odds with the DGU data and more textured research shows explicitly that people actually are better off resisting than giving in.<sup>579</sup> Data from the National Crime Victimization Survey ("NCVS") show that a victim's weapon is taken by the attacker in about 1% of cases where the victim uses a weapon.<sup>580</sup> The NCVS and other sources also show that "[t]here is no sound empirical evidence that resistance does provoke fatal attacks."<sup>581</sup> In a study of all of the NCVS data on robberies from 1979 to 1985, the firearm offered the most effective form of resistance.<sup>582</sup> Resistance with a gun was the method most likely to thwart the crime and most likely to prevent injury to the victim.<sup>583</sup> The NCVS data show that "[t]he use of a gun by the victim significantly reduces her likelihood of being injured" in

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65 (1998) (arguing that "widespread gun ownership among noncriminals may exert various beneficial effects, including the reduction of some kinds of crime through deterrent effects"). The National Opinion Research Center ("NORC") argues that Kleck's figures are probably too high, and the NCVS too low. The NORC estimates annual DGUs in the range of 256,500 to 1,210,000. Tom Smith, *A Call for a Truce in the DGU War*, 87 J. CRIM. L. & CRIMINOLOGY 1462, 1468 (1997). Gary Kleck notes "[t]here are now at least 14 surveys, with an aggregate sample size of over 20,000 cases, and all of the surveys indicate at least 700,000 DGU's [per year]." Gary Kleck, *The Frequency of Defensive Gun Use*, in DON B. KATES & GARY KLECK, *THE GREAT AMERICAN GUN DEBATE* 151, 159 (1997) [hereinafter Kleck, *The Frequency of Defensive Gun Use*].

<sup>577</sup> Kleck, *The Frequency of Defensive Gun Use*, *supra* note 576, at 159; *see also* JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT*, *supra* note 450.

<sup>578</sup> *See* Kleck & Gertz, *Armed Resistance to Crime*, *supra* note 575, at 173 ("Only 24% of the gun defenders in the present study reported firing the gun, and only 8% report wounding an adversary."). As previously indicated, the Kleck/Gertz survey found that 80% of DGUs involved handguns, and that 76% did not involve firing the weapon. *Id.* at 175.

<sup>579</sup> *See* Jongyeon Tark & Gary Kleck, *Resisting Crime: The Effects of Victim Action on the Outcomes of Crimes*, 42 CRIMINOLOGY 861, 902 (2004) ("[U]nless there are circumstances that clearly indicate resistance will lead to significant harm, the evidence reported in this paper indicates that some form of resistance should be the path generally taken.").

<sup>580</sup> *Id.*

<sup>581</sup> *Id.* at 903.

<sup>582</sup> Gary Kleck, *Crime Control Through the Private Use of Armed Force*, 35 SOC. PROBS. 1, 7, 8 tbl.4 (1988).

<sup>583</sup> *Id.* at 7; *see also* Kleck & Gertz, *Armed Resistance to Crime*, *supra* note 575, at 174–75 (reporting survey results showing that crime victims who deployed a gun in self-defense "rarely lose property and rarely provoke the offender into hurting them"); Gary Kleck & Miriam DeLone, *Victim Resistance and Offender Weapon Effects in Robbery*, 9 J. QUANTITATIVE CRIMINOLOGY 55, 73–77 (1993); William Wells, *The Nature and Circumstances of Defensive Gun Use: A Content Analysis of Interpersonal Conflict Situations Involving Criminal Offenders*, 19 JUST. Q. 127, 152 (2002) (citing studies showing that individuals who use a gun for self-defense and survive the incident usually do so uninjured).



situations when the robber is armed with a non-gun weapon.<sup>584</sup> Whether the robber has a gun, or has no weapon, victim gun possession does not seem to affect injury rates.<sup>585</sup>

Another rendition of the firearms costs objection is you will hurt yourself or have an accident. This plays out in advertising of the most tragic types of events—children who get access to guns and shoot themselves or a playmate.<sup>586</sup> Perceptions of this risk are often wildly inflated. On a recent panel before an audience of top-flight lawyers and judges, one of the speakers conducted an informal survey, asking for ballpark estimates about the number of children below the age of 14 killed in firearms accidents annually. By a show of hands, a few people said one million. A handful said 500,000. Nearly half the room said 100,000. Most of the room said at least 50,000. Virtually everyone said at least 10,000. Several months later at a lunch with six New York lawyers, I asked the same question with roughly the same distribution of answers.<sup>587</sup> The actual number of such tragedies for 2010 was about 40.<sup>588</sup>

The fatal gun accident rate for all ages is at an all-time low today,<sup>589</sup> while the per capita gun supply is at an all-time high.<sup>590</sup> The annual risk level for a fatal gun accident is around 0.22 per 100,000 population—about the same risk level as taking two airplane trips a year, or getting a whooping cough vaccination.<sup>591</sup>

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<sup>584</sup> Lawrence Southwick, Jr., *Self-Defense with Guns: The Consequences*, 28 J. CRIM. JUST. 351, 362 (2000).

<sup>585</sup> *Id.* at 361–62.

<sup>586</sup> See, e.g., *Gun Accidents Kill 500 Kids a Year*, MOMLOGIC (Aug. 1, 2008), [http://www.momlogic.com/2008/08/protect\\_your\\_kids\\_from\\_guns.php](http://www.momlogic.com/2008/08/protect_your_kids_from_guns.php) (recounting the story of a toddler who fatally shot himself after finding a gun in his parents' car and listing five other similar tragedies to support the assertion that such accidents are not unusual).

<sup>587</sup> One person estimated one million deaths. Two said around 100,000. One said 50,000. Everyone agreed that it was at least 10,000. The National Safety Council reported that for children in age range 0–19 years, the total number of firearms-related deaths for 2007 was 3,067 if homicide, suicide, and unintentional injuries are included. NAT'L SAFETY COUNCIL, INJURY FACTS 143 (2011) [hereinafter INJURY FACTS]. These 3,067 firearms-related deaths are broken down into 138 unintentional deaths, 683 suicides, and 2,161 homicides, 25 due to legal intervention, and 60 for which the intentionality of the deaths was not determined. *Id.* Viewed by age group, 85 of the total firearms-related deaths were of children under 5-years-old, 313 were children 5–14 years old, and 2,669 were teens and young adults 15- to 19-years-old. *Id.*

<sup>588</sup> *Id.*

<sup>589</sup> See *id.* at 46–49 (reflecting that unintentional gun deaths in 2009 were lower than any other year after 1903 in both nominal and per capita terms).

<sup>590</sup> See Jurgen Brauer, *The US Firearms Industry: Production and Supply*, at 45 (Small Arms Survey, Working Paper No. 14, 2013) (estimating U.S. domestic non-military supply based on government data).

<sup>591</sup> See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 5 (1993) (reporting a risk of dying equal to 0.1 in 100,000 for persons who take one trip via airliner in a given year and a rate of 0.5 in 100,000 for persons who take 5 trips in a year, allowing one to extrapolate that 2 flights in a year equates roughly to a 0.2 in 100,000 mortality risk).

Accidental non-transport-related drownings facilitate far more child fatalities than firearms accidents.<sup>592</sup> Indeed, swimming pool accidents account for more deaths of children under 10 years of age than *all* forms of death by firearm (accident, homicide, and suicide) combined: “The likelihood of death by pool (1 in 11,000) versus death by gun (1 in 1 million-plus) isn’t even close.”<sup>593</sup>

b. Don’t More Guns Just Equal More Gun Crime?

The modern orthodoxy says that easier access to guns explains the exceptionally high rate of homicide in some black communities.<sup>594</sup> But that defies the reality. The fact is that urban areas where disproportionate Black murder rates center—have stricter gun laws, fewer guns, and more gun crime than rural areas where there are far more guns, easier access to guns, and less gun crime.<sup>595</sup> Among young black males, the gun homicide and victimization rates are higher in urban areas (where gun regulation is stricter and gun ownership is lower) than in rural areas (where gun regulation is looser and gun ownership is higher). Kates and Mauser distill the details

Per capita, African-American murder rates are much higher than the murder rate for whites. . . . [O]ne might assume gun ownership is higher among African-Americans than among whites, but in fact African-American gun ownership is markedly lower than white gun ownership. . . .

Per capita, rural African-Americans are much more likely to own firearms than are urban African-Americans. Yet, despite their greater access to guns, the firearm murder rate of young rural black males is a small fraction of the firearm murder rate of young urban black males. [The murder rate of young urban African Americans is roughly 600% higher than that of their rural counterparts.]

These facts are only anomalous in relation to the mantra that more guns equal more death and fewer guns equal less death.

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<sup>592</sup> NAT’L SAFETY COUNCIL, INJURY FACTS 20, 143 (stating that 739 children aged 0- to 14-years-old died in unintentional drownings in 2007, versus 65 that died from unintentional firearms incidents over the same year).

<sup>593</sup> LEVITT & DUBNER, *supra* note 543, at 149–50.

<sup>594</sup> Recall, though, that Marvin Wolfgang’s early Philadelphia study found that knives were the dominant instrument of Black murderers during the four-year period of the study. WOLFGANG, *supra* note 526, at 84.

<sup>595</sup> David Sherfinski, *States’ Crime Rates Show Scant Linkage to Gun Laws*, WASH. TIMES, Jan. 25, 2013, at A1 (citing analysis of the effects of gun-control laws on crime rates by Kleck and Patterson, which concluded that such laws generally do not result in a pattern of discernable impact on crime rates).

In contrast, these facts accord with the earlier point regarding the aberrance of murderers. Whatever their race, ordinary people simply do not murder. Thus preventing law-abiding, responsible African-Americans from owning guns does nothing at all to reduce murderers, because they are not the ones who are doing the killing. The murderers are a small minority of extreme antisocial aberrants *who manage to obtain guns whatever the level of gun ownership in the African American community.*

Indeed, murderers generally fall into a group some criminologists have called “violent predators,” sharply differentiating them not only from the overall population but from other criminals as well. Surveys of imprisoned felons indicate that when not imprisoned the ordinary felon averages perhaps 12 crimes per year. In contrast, “violent predators” spend much or most of their time committing crimes, averaging at least 5 assaults, 63 robberies, and 172 burglaries annually. A National Institute of Justice survey of 2,000 felons in 10 state prisons, which focused on gun crime, said of these types of respondents: “[T]he men we have labeled Predators were clearly omnibus felons . . . [committing] more or less any crime they had the opportunity to commit . . . . Thus, when we talk about ‘controlling crime’ in the United States today, we are talking largely about controlling the behavior of these men.”

The point is not just that demographic patterns of homicide and gun ownership in the African-American community do not support the more guns equal more death mantra. More importantly, those patterns refute the logic of fewer guns equal less death. The reason fewer guns among ordinary African-Americans does not lead to fewer murders is because that paucity does not translate to fewer guns for the aberrant minority who do murder. The correlation of very high murder rates with low gun ownership in African-American communities simply does not bear out the notion that disarming the populace as a whole will disarm and prevent murder by potential murderers.<sup>596</sup>

The general data on violent crime and the gun inventory also refute the more-guns-equals-more-gun-crime thesis. Over the last seventy-five years, the number of guns per 100,000 of population has grown from about

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<sup>596</sup> Kates & Mauser, *supra* note 565, at 676–78 & n.95 (citations omitted).

34,000 per 100,000 to 100,000 per 100,000. Over the same period, the gun homicide rate per 100,000 has oscillated from around three per 100,000 to highs of around 6 per 100,000. Over the last decade, with gun ownership at record levels, gun homicide has been trending down. It was 3.7 per 100,000 in 1999. In recent years, the gun crime rate and violent crime rate have declined consistently.<sup>597</sup> Over this same period, the number of guns in the civilian inventory has continued to grow to its now record level of approximately 323 million firearms.<sup>598</sup>

There is also a telling rebuke to the more-guns-equals-more-gun-crime thesis in the debate about concealed carry of firearms in public discussed in more detail below. The core dispute in that debate centers on the studies by John Lott and other economists concluding that concealed carry laws cause reductions in crime, yielding billions of dollars of benefits in avoided costs.<sup>599</sup> A variety of researchers have attempted to refute Lott's claims about the benefits of guns in the public space.<sup>600</sup> But the striking thing is that the more guns more crime thesis is not even on the table.<sup>601</sup> This is a far cry from the starting objections that concealed carry laws would lead to carnage in the streets, with otherwise law-abiding people suddenly becoming murderers.<sup>602</sup>

## 2. Benefits

### a. Armed Citizens as a Disincentive

Several measures show the benefits of firearms ownership. A national study of gun use against burglaries was conducted in 1994 by the Centers for Disease Control and Prevention ("CDC").<sup>603</sup> This study concluded that over the previous twelve months, there were nearly 1,900,000 episodes

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<sup>597</sup> See ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA* 13, 67–69 (2006) (highlighting data that says the homicide rate peaked in 1991, before declining markedly to a level lower than any annual rate since 1967, and that both the aggravated assault with a firearm and armed robbery rates have followed a very similar pattern).

<sup>598</sup> JOHNSON ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT*, *supra* note 450.

<sup>599</sup> JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 276 (3d ed. 2010).

<sup>600</sup> See, e.g., Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1296 (2003) (arguing that expansion to the data set used by Lott results in evidence that cannot plausibly support that concealed carry laws are likely to reduce crime).

<sup>601</sup> See Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 751–54, 762–63 (2005) (discussing the recent wave of state legislation mandating nondiscretionary licenses to carry concealed firearms within the historical context of such laws to show that the United States is generally no longer seriously considering banning handguns).

<sup>602</sup> *Id.* at 752, 757–61 (aggregating positive responses to the enactment of concealed carry laws in various states to show that "the nightmare scenario" of gunfights erupting between otherwise peaceful civilians for petty reasons has not been a reality).

<sup>603</sup> Robin M. Ikeda et al., *Estimating Intruder-Related Firearms Retrievals in U.S. Households, 1994*, 12 VIOLENCE & VICTIMS 363 (1997).

where someone in the home retrieved a firearm but did not see an intruder.<sup>604</sup> There were roughly 500,000 episodes where the armed householder actually saw the invader and, in roughly 98% of those episodes, the householder believed the gun was instrumental in chasing away the intruder.<sup>605</sup>

Only 13% of U.S. residential burglaries from 1973 to 1982 were classified as “hot” burglaries, meaning the attempt was made against an occupied residence.<sup>606</sup> The avoidance of hot burglaries and the tilt toward daytime invasions is generally attributed to criminals’ fear of confronting an armed resident.<sup>607</sup>

In a study of 105 active burglars, researchers found that “[o]ne of the most serious risks faced by residential burglars is the possibility of being injured or killed by the occupants of a target. Many of the offenders we spoke to reported that this was far and away their greatest fear.”<sup>608</sup>

The story is different outside the U.S. Burglars in other nations seem to be operating under different incentives. For one thing, there seem to be more hot burglaries, as indicated by a 1982 British survey reporting a hot burglary rate of 59% of attempted burglaries.<sup>609</sup> The *Wall Street Journal* summarizes:

Compared with London, New York is downright safe in one category: burglary. In London, where many homes have been burglarized half a dozen times, and where psychologists specialize in treating children traumatized by such thefts, the rate is nearly twice as high as in the Big Apple. And burglars here increasingly prefer striking when occupants are home, since alarms and locks tend to be disengaged and intruders have little to fear from unarmed residents.<sup>610</sup>

In the U.S., home invaders are more at risk of being shot in the act than of going to prison, and it is reasonable to expect that being shot is a

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<sup>604</sup> *Id.* at 367.

<sup>605</sup> *Id.*

<sup>606</sup> U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HOUSEHOLD BURGLARY 4 (1985).

<sup>607</sup> GEORGE RENGERT & JOHN WASILCHICK, SUBURBAN BURGLARY: A TALE OF TWO SUBURBS 33 (2d ed. 2000) (finding that late night burglaries were unpopular because it was too difficult to tell if anyone was home and most burglars avoid confrontation with residents of homes they break into at all costs); see also JOHN E. CONKLIN, ROBBERY AND THE CRIMINAL JUSTICE SYSTEM 85 (1972) (reporting from a study of Massachusetts inmates that some gave up burglary because of “the risk of being trapped in the house by the police or an armed occupant”).

<sup>608</sup> RICHARD T. WRIGHT & SCOTT H. DECKER, BURGLARS ON THE JOB: STREETLIFE AND RESIDENTIAL BREAK-INS 112 (1994).

<sup>609</sup> PAT MAYHEW, RESIDENTIAL BURGLARY: A COMPARISON OF THE UNITED STATES, CANADA AND ENGLAND AND WALES (1987).

<sup>610</sup> Kevin Helliker, *Pistol-Whipped: As Gun Crimes Rise, Britain Is Considering Cutting Legal Arsenal*, WALL ST. J., Apr. 19, 1994, at A1.

stronger deterrent than being incarcerated.<sup>611</sup>

Hot burglaries also carry an elevated risk of assault. In 1985, the U.S. rate of hot burglaries was 13%, compared with an average of 45% in three low gun-ownership nations.<sup>612</sup> Criminologist Gary Kleck estimates the number of assaults would increase by 545,713 if U.S. burglars were equally likely to enter occupied premises.<sup>613</sup> This would raise the overall American violent crime rate 9.4%.<sup>614</sup> David Kopel argues that because burglars do not know *which* homes have a gun, people who do not own guns enjoy substantial free-rider benefits because of the deterrent effect of the knowledge that many people have guns.<sup>615</sup>

In a survey of convicted felons conducted by James Wright and Peter Rossi for the National Institute of Justice, 34% of the felons reported personally being “scared off, shot at, wounded, or captured by an armed victim.”<sup>616</sup> Nearly 40% had refrained from attempting a crime because they thought the victim might have a gun.<sup>617</sup> Fifty-six percent said that they would not attack some one they knew was armed and 74% agreed that “[o]ne reason burglars avoid houses when people are at home is that they fear being shot.”<sup>618</sup>

Wright and Rossi concluded, “the highest concern about confronting an armed victim was registered by felons from states with the greatest relative number of privately owned firearms.”<sup>619</sup> the major effects of partial or total handgun bans would fall more on the shoulders of the ordinary gun-owning public than on the felonious gun abuser of the sort studied here. . . . [I]t is therefore also possible that one side consequence of such measures would be some loss in the

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<sup>611</sup> JAMES D. WRIGHT ET AL., *UNDER THE GUN: WEAPONS, CRIME, AND VIOLENCE IN AMERICA* 14 (1983); *see also* Kleck, *supra* note 576, at 12.

<sup>612</sup> KLECK, *POINT BLANK*, *supra* note 575, at 140.

<sup>613</sup> *Id.*

<sup>614</sup> *Id.*

<sup>615</sup> David B. Kopel, *Lawyers, Guns, and Burglars*, 43 ARIZ. L. REV. 345, 363–66 (2001); *see also* David B. Kopel, *Comment* to Philip J. Cook & Jens Ludwig, *Guns & Burglary*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 109, 109–16 (Jens Ludwig & Philip J. Cook eds., 2003) (responding to criticism of the theory that guns provide a deterrence to burglary). *Contra* Philip J. Cook & Jens Ludwig, *Guns & Burglary*, in *EVALUATING GUN POLICY: EFFECTS ON CRIME AND VIOLENCE* 74, 104 (Jens Ludwig & Philip J. Cook eds., 2003) (arguing that the “[p]revious evidence [suggesting that gun ownership deters burglars] is indirect, anecdotal, or based on flawed data . . . [and concluding that a] hot-burglary victimization rate tends to increase with gun prevalence”).

<sup>616</sup> JAMES D. WRIGHT & PETER H. ROSSI, *ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS* 155 (expanded ed. 1994).

<sup>617</sup> *Id.*

<sup>618</sup> *Id.* at 146.

<sup>619</sup> *Id.* at 151.

crime-thwarting effects of civilian firearms ownership.<sup>620</sup>

There is other evidence of firearms benefits in the consequences of targeted firearms policy. In October 1966, the Orlando, Florida Police Department started a highly publicized firearms safety training for women.<sup>621</sup> Women in the city had been buying guns at an increased rate after a dramatic increase in sexual assaults.<sup>622</sup> The police department did not discourage them, but wanted to help them be safe and proficient. Over the next year, the incidence of rape dropped by 88%.<sup>623</sup> Burglary fell by 22%.<sup>624</sup> There is no evidence that any of the women in the program was involved in a shooting. Researchers concluded “[i]t cannot be claimed that this was merely part of a general downward trend in rape, since the national rate was increasing at the time. No other U.S. city with a population over 100,000 experienced so large a percentage decrease in the number of rapes from 1966 to 1967 . . . .”<sup>625</sup> That same year, rape increased by 5% in Florida and by 7% nationally.<sup>626</sup>

Economist John Lott argues that one of the most substantial drivers of crime reduction is the proliferation of shall issue concealed carry licenses to law-abiding people. More guns in the hands of honest people in public spaces, says Lott, deters criminals and generates billions of dollars of benefits per year in avoided costs of crime.<sup>627</sup> Lott’s assessment matches the intuition that a shift in the distribution of guns in the public space toward more guns in the hands of the law-abiding makes criminal activity more risky, less profitable and less likely to occur. Lott’s claims have drawn criticisms and rebuttals. In 2004, a panel of the National Academy of Sciences assessed Lott’s claims.<sup>628</sup> The majority of the panel concluded that the data was inadequate to conclude whether right to carry laws increased or decreased crime.<sup>629</sup> One panel member, political scientist

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<sup>620</sup> *Id.* at 238.

<sup>621</sup> Gary Kleck & David J. Bordua, *The Factual Foundation for Certain Key Assumptions of Gun Control*, 5 LAW & POL’Y Q. 271, 284 (1983).

<sup>622</sup> Don B. Kates, *The Value of Civilian Handgun Possession as a Deterrent to Crime or a Defense Against Crime*, 18 AM. J. CRIM. L. 113, 153 (1991).

<sup>623</sup> Kleck & Bordua, *supra* note 621, at 284.

<sup>624</sup> *Id.* at 286.

<sup>625</sup> *Id.* at 284.

<sup>626</sup> Kates, *supra* note 622, at 153. One set of commentators argued that the drop in Orlando rapes was statistically insignificant, as it was within the range of possible normal fluctuations. David McDowall et al., *General Deterrence Through Civilian Gun Ownership: An Evaluation of the Quasi-Experimental Evidence*, 29 CRIMINOLOGY 541, 545–47 (1991). However, these authors’ statistical model was such that even if gun-based deterrence had entirely eliminated all rapes in Orlando in 1966–1967, the model would still have declared that result to be statistically insignificant. KLECK, *TARGETING GUNS*, *supra* note 576, at 181.

<sup>627</sup> LOTT, JR., *supra* note 599, at 276, tbl.10.6.

<sup>628</sup> *Id.* at 301.

<sup>629</sup> *Id.*

James Q. Wilson, filed a dissent, concluding that the evidence presented by Lott supports the conclusion that right to carry laws drive down the murder rate.<sup>630</sup> Wilson had supported gun control measures in the past,<sup>631</sup> and gained fame as the originator of the “Broken Windows” theory of crime control.<sup>632</sup> Wilson concluded that “the best evidence we have is that [right to carry laws] impose no costs but may confer benefits.”<sup>633</sup>

b. A Race-specific Assessment

The studies summarized above are broad measures that do not specify distinct racial trends. There is, however, a study of this issue in the specific context of the black community. The Rose and McClain study from 1981 started with data sets about black homicides.<sup>634</sup> It then traced the victims and offenders and interviewed people who knew them, people familiar with the episode, and the parties involved (including perpetrators or survivors of the altercations).<sup>635</sup> The results show how armed self-defense by the Parker/McDonald class could be good policy.

In a sample of selected American cities, Rose and McClain found that “[r]obbery homicide is the most frequently occurring pattern among stranger homicides in our sample cities, where it accounts for approximately two-thirds of all stranger homicides.”<sup>636</sup> But the next finding is surprising: “[y]oung adult black men who are robbery homicide victims are more often persons described as the robber than the robbed. This pattern appears to prevail in each of the primary sample cities . . . .”<sup>637</sup> This pattern was not unbroken. In Detroit, for example, “between 1970–72 the majority of the victims were identified as robbers, but in 1973 and 1974 the robbed exceeded the robbers in total annual victimizations.”<sup>638</sup>

The next assessment is vital for our purposes: “[g]iven the higher percentage of robber homicide victimizations in the early years of the interval, one might assume that targets posing a higher homicide risk for

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<sup>630</sup> *Id.* at 301–02.

<sup>631</sup> See James Q. Wilson, *Just Take Away Their Guns*, N.Y. TIMES MAG., Mar. 20, 1994, at 47 (advocating more searches and seizures of guns illegally carried or possessed while opposing new restraints on legally purchased guns).

<sup>632</sup> George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MAG., Mar. 1982, available at [www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465](http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465) (theorizing that maintaining and patrolling urban neighborhoods will reduce crime).

<sup>633</sup> James Q. Wilson, *Dissent* to NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 270 (2005).

<sup>634</sup> ROSE & MCCLAIN, *supra* note 519, at 2.

<sup>635</sup> *Id.* at 13.

<sup>636</sup> *Id.* at 115.

<sup>637</sup> *Id.*

<sup>638</sup> *Id.* at 116.



the offender were abandoned in favor of safer targets.”<sup>639</sup> Note that the idea of hardening targets against the aggressive microculture is the core theme of arguments that an armed citizenry is a disincentive to crime.<sup>640</sup> The researchers concluded that over a six-year period in Detroit, the robbery homicide was nearly as likely to result in the death of the robber as the robbed and that “[t]he defensive efficiency of those who are successful in thwarting a robbery attempt probably exceeds that of the criminal justice system.”<sup>641</sup>

This is difficult territory. One can imagine why policy makers would not embrace these data or advance affirmative policies exploiting this trend. But from the perspective of the Parker/McDonald class—people living in the midst of clear threats and state failure—these data are a welcome affirmation of the benefits of private firearms in the hands of good people. The Rose and McClain study underscores that message with this summary:

The previous evidence illustrating the riskiness of becoming a victim if choosing to engage in robbery is a point seldom made. One must exhibit caution not to overstate the case, considering the low clearance rate for this offense. Yet it appears that robbers are indeed sensitive to the risk associated with the choice of robbery targets. This is evident in the changing ratio of commercial to non-commercial targets. Young black males who are insensitive to the risks associated with the choice of a robbery target clearly increase the probability that they will become homicide victims.<sup>642</sup>

The Rose and McClain study suggests that not only is there a distinct criminal microculture within the community, it also suggests that the criminal class responds to disincentives that make violent crime more risky. Based on the broader data it is fair to believe arming the Parker/McDonald class is one of those disincentives.<sup>643</sup>

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<sup>639</sup> *Id.*

<sup>640</sup> See LOTT, JR., *supra* note 599, at 215 (explaining the “crime hazard model” in which potential criminals will respond to the actual increased risk they face from an armed citizenry).

<sup>641</sup> ROSE & MCCLAIN, *supra* note 519, at 117.

<sup>642</sup> *Id.*

<sup>643</sup> My claim that firearms policy in the Black community should privilege the Parker/McDonald class of innocents is open to at least two fair objections. Besides the Parker/McDonald class, there is another important class of innocents who are put at risk by firearms externalities—things like cross fire, stray shots, and accidents for which self-defense is no answer. This group actually overlaps with the Parker/McDonald class, but treating it separately would give the maximum credit to the claim that this interest is a fair counterweight to my claims about the self-defense interests of the Parker/McDonald class. Balancing those interests would involve for example, comparisons between DGUs and accidents and a variety of other comparisons. The DGU numbers, for example, range into the millions. The accidental death numbers are in the hundreds. People will contest exactly how those inputs should be

I have not attempted a comprehensive assessment of social science. That will require far more time and many more viewpoints. My aim here is only to demonstrate the case that arms in the hands of the Parker/McDonald class can generate results that compete easily with the modern orthodoxy's combination of promising symbolism and practical failure.

## VI. CONCLUSION

My Uncle, Howard Jefferson Crump, was President of the Greenbrier County, West Virginia NAACP from 1954 through 1979.<sup>644</sup> I was around ten years old when he told me about using his pistol to fight off a racist attack. He was proud of the institutional gains achieved by the NAACP. But where we lived, the modern orthodoxy never resonated. For rural people, the limitations of the state tend to be more obvious.

Those limitations were glaringly apparent in 1963, when Howard's brother, my Uncle Clarence, turned up dead in the creek behind my house. Although I have no memory of it, my mother says that a playmate and I were the first to discover the body. The culprit was never identified. The open question was whether Clarence was carrying his pistol? Was it taken from him? Was the assailant someone he trusted?

People objected when the death was ruled accidental. But no one complained that the police should somehow have protected Clarence. Country people understand that it would be pure magic for the police to happen along some shady path the very same instant a violent threat

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calculated. And some will suggest other types of comparisons. It is also relevant that these data are drawn from the general population. It may turn out that particular black urban communities will be exceptional in ways that are not reflected in the overall data.

One might also highlight that one of the negative externalities of even a virtuous armed citizenry is that some percentage of guns owned by good people will be stolen and sold into the black market. I count in this category the arguably distinct worry about the shared access gun, owned legally, but taken and used by some untrustworthy member of the household.

What these concerns dictate about policy is open for fair debate. Some will argue that the black market already is full of non-perishable guns. The more pointed question is whether the concern about gun theft is a justification for geographically targeted gun bans that some have urged—i.e., effectively a revival of the D.C. and Chicago bans. The answer may be a practical one. We know those bans failed. We might decide that these worries are compelling arguments for sharper focus on safe storage, theft reporting, and innovations like frangible ammunition. And the government interest in those things might be stronger in some places than others.

These policy questions are open to fair debate. But these points of detail only underscore the broader weakness of the modern orthodoxy. The failed blunt gun bans advanced as core policy under the modern orthodoxy return us to the core normative question: Why should the black community subordinate the claims and interests of the Parker/McDonald class to an agenda that is fundamentally at odds with the state and the traditional stance of the community and the leadership on armed self-defense? As it stands, the modern orthodoxy fails to answer that question.

<sup>644</sup> *West Virginia Civil Rights Day: Honorees 2004*; FROM WHENCE WE CAME, <http://www.wva.state.wv.us/civilrights/pasthonorees.htm> (last visited Mar. 5, 2013).

appears. Among the preachers, teachers, deacons, and working class church people who populated my early life, firearms were ubiquitous.<sup>645</sup> They still are.

Empirical work on the risks and utilities of gun ownership in the black community is incomplete. But the glib assumption that the modern orthodoxy is the only authentically black viewpoint on the gun issue is unsustainable. There are sound reasons in our tradition and in our current circumstances for blacks to pull away from the political inertia of the modern orthodoxy and toward an open-minded re-engagement of firearms policy.

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<sup>645</sup> Included in this group were my grandfather, Reverend Nathaniel Johnson, Sr., and my father Reverend Nathaniel Johnson, Jr. From about age ten, my regular job on Sundays, when we visited my grandparents for dinner, was to reload and “test fire” the rifle that my grandmother kept behind the kitchen door. When she died at the age of ninety-four, she left behind that rifle, the pistol she kept in her nightstand, and two shotguns.